No. 85-401

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IN THE

Supreme Court of the United States

October Term, 1984

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN, and WILLIAM C. BRENNAN,

Appellants,

vs.

MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES and ENRIQUE CALDERON,

Respondents.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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Questions Presented

1. Whether the provisions of the New York State Constitution, Art. VI § 25(b) and Judiciary Law § 23, which require the mandatory retirement of all judges on the last day of the year in which they become 70 years of age violate the equal protection clause of the United States Constitution by: (a) unreasonably discriminating between judges under age 70 and those over age 70; (b) unreasonably discriminating between Supreme Court judges who may be certified for further service until age 76 and other judges who cannot be so certified; and (c) unreasonably discriminating between judges and all other elected and appointed public officials who are not subject to any mandatory retirement provision.

2. Whether the aforesaid provisions violate the due process clause by creating an irrebuttable presumption that judges over 70 are not physically and mentally capable of performing their duties.

Parties

The parties are set forth in the caption herein.

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Opinions Below

The opinion of the Supreme Court of the State of New York, County of New York, is reported at N.Y. Law Journal, Dec. 20, 1984, pg. 12, col. 6, and is set forth in the Appendix, *infra,* p. 28a.

The opinion of the Supreme Court, Appellate Division, First Department, is reported at 105 A.D.2d 193, 483 N.Y.S. 2d 690 (1st Dep't 1984) and is set forth in the Appendix, *infra* p. 14a.

The opinion of the Court of Appeals of the State of New York is reported at 64 N.Y.2d 242, 48 N.Y.S.2d 724 (1984) and is set forth in the Appendix, *infra*, p. 1a.

Grounds of Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this appeal drawing into question the validity of Art. VI, § 25(b) of the New York State Constitution *infra* p. 60a, and the New York State Judiciary Law § 23 *infra*, p. 59a on the ground that they are repugnant to the Constitution of the United States.

The appellants, an elected Justice of the Supreme Court of the State of New York (hereinafter "New York Supreme Court") an appointed Judge of the Court of Claims of the State of New York (hereinafter "Court of Claims") and elected Judges of the Civil Court of the City of New York, (hereinafter "Civil Court") sought and were granted a judgment and order from the New York Supreme Court, enjoining and restraining the Governor of the State of New York and the agency responsible for administration of the court system from causing the involuntary retirement of the appellants and all others of the same class on account of their having reached the age of 70, prior to the expiration of their terms, on the ground that mandatory retirement at age 70 is a violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

On appeal to the Appellate Division, that Court reversed and granted respondents' motion to dismiss the complaint.

The New York Court of Appeals affirmed the ruling of the Appellate Division on December 31, 1984.

Timely notice of appeal to this Court was filed in the Court of Appeals on March 2, 1985 *infra* p. 55a, and in the New York Supreme Court on March 1, 1985 *infra* p. 50a.

The docketing of this appeal is not timely because of the highly unusual and unexpected occurrence in the office of appellants' attorneys, Giaimo & Vreeburg, to wit:

An associate attorney in the firm, Peter Roth, who had been assigned the task of researching and writing the draft briefs below and was ostensibly re-drafting the brief for this Court, was entrusted with the duty and obligation of serving the Notice of Appeal and perfecting the appeal from the decision of the New York Court of Appeals. He did in fact serve the Notice of Appeal on the appropriate parties and filed the Notice in the proper offices on or about March 1 and 2, 1985. From March through May Mr. Roth represented to Mr. Giaimo in response to Mr. Giaimo's constant reminders and inquiries that the jurisdictional statement had been completed and that he eventually filed the statement with this Court in a timely fashion in March 1985. In fact, it is the recollection of Mr. Giaimo that he read a draft copy of the jurisdictional statement presented to him by Mr. Roth; thus, he had no reason to question Mr. Roth's representation that the statement had been mailed to this Court.

Thereafter, during May and early June, Mr. Giaimo continually monitored Mr. Roth, checking the status of the

appeal, and specifically asking whether the draft brief was ready for review. Mr. Roth stated that he was almost finished with his research and drafting, that everything was "in order" and that the brief would be timely filed.

Towards the end of May and early June, Mr. Roth was seen in the office less and less, and he abruptly, and out of character, announced to Mr. Giaimo a few days in advance that he needed a vacation and was going to North Carolina. When queried about the deadline for filing the brief Mr. Roth answered that upon his return from vacation the brief would be timely completed and filed.

While Mr. Roth was in North Carolina, Mr. Giaimo became concerned about the brief and asked an associate attorney to call the Clerk of this Court to ascertain the docket number of the case. When the clerk advised him that the computers were "down" that day, but that he could not find a docket number or any reference to this case, Mr. Giaimo desperately and unsuccessively tried to reach Mr. Roth in North Carolina.

On Sunday night, June 16th, Mr. Roth called Mr. Giaimo and announced that he was no longer capable of doing any work, that his mind was "not together," and that he had already made plans to move to Israel to "pick grapefruits in a kibbutz," i.e., a commune. Mr. Giaimo felt at that moment that Mr. Roth was in great distress and apparently of failing mind.

The following day the entire office staff began looking for the jurisdictional statement and the brief which was ostensibly in draft, but neither could be found.

Mr. Giaimo then began making telephone calls to every person who could conceivably know of Mr. Roth's whereabouts, but could not find him. Mr. Roth just simply disappeared for about ten days.

From out of nowhere, Mr. Roth contacted Mr. Giaimo on June 25th and admitted to Mr. Giaimo that he was "not well" and was seeking psychiatric care; that he was having a "breakdown" and that he was leaving immediately for Israel. During the course of the conversation he was crying and trembling and appeared to be in need of immediate medical help; he was clearly not of a sound mind. Mr. Roth also "swore" that he had filed a jurisdictional statement but he admitted that he could no longer trust his memory. When asked about the whereabouts of the statement, the covering letter and proof of service, he began to cry and admitted that "maybe I didn't do it but I thought I did. I just can't tell anymore."

For the reasons indicated above, it is respectfully requested that this Court permit the late filing of the within jurisdictional statement, especially because of the very profound questions of law involved which have not previously been answered by this Court. In addition, it is important for this Court to note that the respondents will not suffer any change of position or injury on account of the requested late filing because the questions involved herein will continue to arise in the State of New York and must be resolved, whether in this case or some future case which contain the exact same fact pattern. Indeed, the highest court of the State of New York has now spoken and it would serve no purpose for other plaintiffs to commence an action in this state and wind its way through the appel-

late courts with the same result, viz., an appeal to this Court.

As the New York Court of Appeals explicitly rejected appellants' challenge to Art. VI § 25(b) of the New York State Constitution and the New York State Judiciary Law § 23, this matter is appropriately brought to this Court by appeal.

Constitutional and Statutory Provisions Involved

This case involves the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Art. VI § 25(b) of the New York State Constitution provides as follows:

> Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as

> provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six. A retired judge or justice shall be subject to assignment by the appellate division of the supreme court of the judicial department of his residence. . . .

New York State Judiciary Law § 23 provides:

> No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of December next after he shall be seventy years of age, except that a judge or justice in office or elected or appointed to office at the effective date of this section, as to whom no provision limiting his right to hold office to the close of the year following his attaining the age of seventy years was applicable prior to the elective date of this section, may continue in office during the term for which he was elected or appointed.

Statement

The appellants other than Brennan were Civil Court judges. Potoker (whose name does not appear in the title although his action was merged into the case) was a Court of Claims judge. All of the judges reached the age of 70 in 1984; because of New York's mandatory retirement provisions they were compelled to retire on December 31, 1984, before the expiration of their terms of office without any claim of physical or mental incompetence. The appellant Brennan is a Supreme Court judge who will reach the age of 70 in 1988 and will be compelled to retire on December 31, 1988. He will be eligible for "certification" for three suc-

cessive two-year terms when he reaches age 70 although he will be officially "retired."

The appellants brought these proceedings upon the sole theory that the foregoing provisions violated the due process clause because of the "irrebuttable presumption" that they were not physically or mentally capable of serving after they became 70, and their equal protection rights because of the arbitrary classification of judges over and under 70 and between judges over 70 and all other elected public officials who are over 70. A final, and equally important argument was that the judges' equal protection rights were violated by unreasonably discriminating between Supreme Court judges who may be certified for additional terms until age 76 and lower court judges who may not be extended beyond age 70.

How the Federal Questions Were Raised and Decided Below

The appellants moved before trial to enjoin their compulsory retirement. Justice Bruce McM. Wright of the Supreme Court found: "that the State Constitution's mandatory retirement provisions for judges and justices is invalid as being violative of both due process and the equal protection clause of the Fourteenth Amendment to the U.S. Constitution." In so ruling Justice Wright said:

> So, what is the 'reasonable basis' for the law? It fails to disclose itself under the circumstances discussed. It is not so that the law creates an irrebuttable pretumption as it is that the law cannot be sustained rationally, or as occupationally related. To give such a law the artificial respiration of judicial approval is to

> sneer at due process and equal protection. Neither course is the office of this court. (45a)

On appeal, the Appellate Division, *Maresca* v. *Cuomo*, 105 A.D.2d 193, 483 N.Y.S.2d 690 (1st Dep't 1984), reversed the lower court, relying upon *Malmed* v *Thornburgh*, 621 F.2d 565 (3d Cir.), *cert. den.* 449 U.S. 955 (1980). The court quoted in its entirety the four reasons advanced by the Pennsylvania Constitutional Convention which created the law in that state as a sufficient rationale to sustain the New York law. The *Malmed* rationale was that the law:

> 'increases judicial manpower by bringing in younger judges while retaining the part-time services of willing and able retired judges. . . . eliminates the unpleasantness of selectively removing aged and disabled judges, and the third reason, that prevention of harm by a few senile judges more than offsets loss of judges who retain full powers past normal age. In addition, the convention could rationally place a premium on avoiding the unpleasantness and public humiliation associated with individual removal. Fourth, the provision conforms to the recommendations of the American Bar Association, the Pennsylvania Bar Association, and the National League of Cities, and corresponds with the current trend toward mandatory retirement at seventy in other public and private employment.'

The Appellate Division said at 483 N.Y.S. at 693:

> While the [*Malmed*] considerations were specifically addressed at the Pennsylvania Constitutional Convention adopting the challenged provision there, there is no reason not to apply them (insofar as relevant) to the similar New York Constitutional provision. They need not have been specifically mentioned in the legislative history or background. The Pennsylvania rationale is as valid for New York, as if it had been

> expressed by or to the New York State Constitutional Convention. Accordingly, it is quite clear that there is a rational basis for the classification contained in the provisions under attack, and that is all that is legally required to uphold them.
>
> In sum, there have been many challenges to mandatory retirement of judges at age seventy, but all have been unsuccessful. . . .

On appeal, the Court of Appeals, 64 N.Y.2d 242, 48 N.Y.S.2d 724 (1984) restated the rules of *Malmed* and added a few reasons of its own to sustain the law:

> This court is fully cognizant of the arguments that can be made against the wisdom of the challenged provisions; however, for the repeal of such provisions, appeal lies to the ballot and to the legislative processes of democratic government, not to the courts . . . [citing cases]. This constitutes the very core of the democratic process which, under law, proscribes only *unconstitutional* action . . . [citing cases]. Hence, we observe at the threshould that as a court of law, our only concern is with plaintiffs' claims that the mandatory retirement provisions do violence to the equal protection and due process clauses of the Fourteenth Amendment of the Federal Constitution.
>
> On appeal to this court, plaintiffs contend that the mandatory retirement restrictions are violative of the Fourteenth Amendment to the United States Constitution on the grounds that the provisions discriminate between Judges under age 70 and those over age 70, and discriminate against plaintiffs by permitting Justices of the Supreme Court and Judges of the Court of Appeals to receive certification for service, as Justices of the Supreme Court, until the age of 76, in contrast to those members of the judiciary who serve upon the Civil Court, Criminal Court, Family

Court, County Court, Surrogate's Court and Court of Claims, none of whom may be so certified. Also plaintiffs seek to invalidate the mandatory retirement provisions under the due process clause of the Fourteenth Amendment.

Turning to plaintiffs' first equal protection argument, it is clear that the Judges who have attained the age of 70 do not constitute a suspect class for purposes of equal protection analysis. (See *Vance* v. *Bradley*, 440 U.S. 93 . . . *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307 . . .) Nor do the constitutional and statutory age restrictions impermissibly interfere with the exercise of a fundamental right. . . . Thus, the challenged provisions are not to be subjected to strict judicial scrutiny, but, rather, to a rational basis standard of review. Pursuant to traditional rational basis analysis, a legislative enactment will pass constitutional muster if the governmental classification is based upon some conceivable and legitimate State interest (*People* v. *Drayton*, 39 N.Y.2d 580, 385 N.Y.S.2d 1, 350 N.E.2d 377). If any conceivable state of facts will support the classification, said provisions will not be held violative of the equal protection clause . . . [citing cases]. A fortiori that reasoning applies where, as here, the validity of a State constitutional provision, rather than a mere ordinance or statute, is adjudged under the Federal Constitution.

The mandatory retirement age limitation for State Judges is rationally related to the promotion of any or all of the following State interest: (1) advancement of general considerations of judicial efficiency (*Rubino* v. *Ghezzi* 2nd Cir., 512 F.2d 431, 433 *cert. den.* 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122); (2) motivation and encouragement of qualified, younger attorneys with judicial aspirations, by this orderly process of attrition (*Rubino* v. *Ghezzi, supra; Vance* v. *Bradley*, 440 U.S. 93, 100, 99 S.Ct. 939, 944, 59 L.Ed.2d 171,

supra); (3) elimination of the unpleasantness and embarrassment of selectively removing aged and disabled Judges (*Malmed* v. *Thornburgh*, 3rd Cir. 621 F.2d 565, 572, *cert. den.* 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219); (4) prevention of harm by a few disabled Judges which more than offsets loss of Judges who retain full powers past age 70 (*Malmed* v. *Thornburgh*, *supra*); (5) elimination of the administrative burden of testing each Judge attaining the age of 70 to assess competency; (6) avoidance of the economic burden of testing and removing incapable Judges; and (7) the fixing of a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber Judges in the system (*O'Neil* v. *Baine*, 568 S.W.2d 761 [Mo.]). The challenged provisions mandating retirement at the end of the year in which age 70 is reached manifestly have a rational basis.

As to the disparity of treatment between Supreme Court and other Judges, the Court said at 485 N.Y.S.2d 728:

> The second branch of plaintiffs' equal protection challenge seeks to invalidate the mandatory retirement provisions upon the ground that an associated provision permits Justices of the Supreme Court and Judges of the Court of Appeals to receive certification for further judicial service until the age of 76, in contrast to those members of the judiciary who serve upon the Civil Court, Criminal Court, Family Court, County Court, Surrogate's Court and Court of Claims, none of whom may be so certified. Due to the complexity and diversity of the judicial grist of Supreme Court (N.Y. Const., art. VI, § 7), certification of Supreme Court justices and Court of Appeals Judges for service in the Supreme Court is warranted to retain Judges with experience, and to insure an adequate supply of judicial personnel to meet the press of

> Supreme Court business. With respect to the broad, general jurisdiction conferred upon the Supreme Court, it has been early noted that the court's jurisdiction includes 'all cases of every description in law and equity, from the most important and complicated to the most insignificant' (*De Hart* v. *Hatch*, 3 Hun. 375, 380). Mindful of the State-wide reach of Supreme Court jurisdiction, the absence of maximum monetary limitations upon invocation of Supreme Court jurisdiction, and the conferral of jurisdiction over certain simple or specialized matters upon other courts (see Siegel, N.Y.Prac., § 12), the complexity of Supreme Court matters may rationally be deemed to require greater experience and manpower than are necessary in other courts. Where, as here, significant reasons of fiscal concern and the proper administration of the courts exist, or could conceivably exist, to justify distinctions between judicial offices, the lack of mathematical symmetry within the unified court system shall be disregarded (*Matter of Tolub* v. *Evans*, 58 N.Y.2d 1, 8, 457 N.Y.S.2d 751, 444 N.E.2d, 1 app. dsmd. 460 U.S. 1076, 103 S.Ct. 1760, 76 L.Ed.2d 337; see *Williamson* v. *Lee Opt. Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563).

As to the appellants' irrebuttable presumption argument, the Court said at 485 N.Y.S.2d 729:

> Plaintiffs' argument that mandatory retirement provisions violate the due process clause of the Fourteenth Amendment, by creating an irrebutable presumption that Judges over the age of 70 are physically or mentally incapable, need not long detain us. The instant case presents neither a classification adopted as an administrative device to serve as evidence of another classification (see *Bell* v. *Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90; *Vlandis* v. *Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63; *United*

States Dept. of Agric. v. *Murry*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767) nor the application of a procedure implicating the fundamental interests of affected individuals such as custody of children (*Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551) or the freedom of choice in matters of marriage and family life (*Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52)—the traditional contexts in which the irrebuttable pressumption doctrine has been employed (*Malmed* v. *Thornburgh*, 621 F.2d 565, 574-575 *supra*). Under circumstances closely analogous to those herein presented, claims that impermissible irrebuttable presumptions were created were summarily rejected (*Weisbrod* v. *Lynn*, 383 F. Supp. 933, affd. 420 U.S. 940, 95 S.Ct. 1319, 43 L.Ed. 2d 420; *Rubino* v. *Ghezzi*, 512 F.2d 431, *supra; McIlvaine* v. *Pennsylvania*, 454 Pa. 129, 309 A.2d 801, app. dsmd. 415 U.S. 986, 94 S.Ct. 1583, 39 L.Ed.2d 884.

Perhaps recognizing that the irrebuttable presumption doctrine may be viewed as a veiled adoption of a rigorous equal protection scrutiny (*United States Dept. of Agric.* v. *Murry*, 413 U.S. 508, 519, 93 S.Ct. 2832, 2838 [Marshall, J., concurring], *supra;* Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv.L.Rev. 1534, 1556), the United States Court of Appeals for the Second Circuit has limited application of the doctrine to those cases involving suspect classifications or fundamental interests (*Johnson* v. *Lefkowitz*), 2nd Cir., 566 F.2d 866, 869, cert. den. 440 U.S. 945, 99 S.Ct. 1421, 59 L.Ed.2d 633, citing *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583), of which age is not one (see, e.g., *Weiss* v. *Walsh*, 324 F.Supp. 75, *affd.* 461 F.2d 846, cert. den. 409 U.S. 1129, 93 S.Ct. 939, 35 L.Ed.2d 262). Since the due process doctrine of irrebuttable presumptions is coextensive with the equal protection clause (*Trafelet* v. *Thompson*, 594 F.2d 623, 630; *Johnson* v. *Lefkowitz*, *supra*, and our fore-

going equal protection analysis demonstrates a rational basis for the age limitation upon judicial tenure, plaintiffs' due process claim is without merit.

The Federal Questions Are Substantial

As construed by New York's highest court, Art. VI § 25(b) and Judiciary Law § 23 allow mandatory retirement from the bench of all judges before the expiration of the appointive or elective term at the mere happening of a 70th birthday irrespective of the physical or mental capabilities of the jurist and provides for certification for up to six years only for Supreme Court and Court of Appeals judges.

This Court has not ruled upon the very heavy questions raised herein, although *certiorari* was denied in the *Malmed* case. Indeed, this Court has not had a similar case before it. No constitutional or legislative body ever advanced a *raison d'etre*—a rationale—for the challenged provisions and the question concering the arbitrary treatment of age between classes of judges. Of course, this case differs from the recent rulings by this Court under the federal Age Discrimination of Employment Act of 1967, as amended, but it would appear that this Court should clarify for the nation the question of age discrimination so as to tell us whether age is now a suspect class and whether the states are free to adopt a different attitude from this Court.

It is respectfully submitted that this Court has now been presented with the first—profound—opportunity to decide a very substantial constitutional question relating not only to age discrimination but discrimination between classes of jurists with respect to age.

POINT I

The Mandatory Retirement Provisions Violate the Due Process Clause of the United States Constitution.

Appellants' due process argument is based on the "irrebuttable presumption" doctrine, which has been summarized as follows:

> In a series of opinions over the past few years the Supreme Court has developed a doctrine under the due process clause of the fifth and fourteenth amendments dealing with what it has termed "irrebuttable presumptions." The cases, *Bell* v. *Burson,* [402 U.S. 535 (1971)], *Stanley* v. *Illinois,* [405 U.S. 645 (1972)], *Vlandis* v. *Kline,* [412 U.S. 144 (1973)], *United States Department of Agriculture* v. *Murry,* [413 U.S. 508 (1973)], and *Cleveland Board of Education* v. *LaFleur,* [414 U.S. 632 (1974)], impose a new constitutional requirement upon certain statutory classifications. The statutes involved contained rules denying a benefit or placing a burden on all individuals possessing a certain characteristic. In the irrebuttable presumption cases, the Court has treated such a classification as being employed only to effect a second classification, one more directly tied to the true statutory purpose. The characteristic is seen as the 'basic fact' from which the 'presumed fact'—possession of whatever quality is relevant to the postulated ultimate purpose—is inferred. The recent Supreme Court cases have held that if it is not 'necessarily or universally true in fact' that the basic fact implies the presumed fact, then the statute's irrebuttable presumption denies due process of law.

Note, "The Irrebuttable Presumption Doctrine in the Supreme Court," 87 Harvard L. Rev. 1534 (1974).

The reasoning of the irrebuttable presumption cases is typified in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), which concerned administrative regulations requiring pregnant teachers to take mandatory leaves of absence at the beginning of their fifth or sixth month of pregnancy. This Court found that the objective of the regulations, keeping physically unfit teachers out of the classroom, was "perfectly legitimate." *Id.* at 643. Nevertheless, the regulations were struck down on the ground that they:

> amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that pressumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

Id. at 644.

The *LaFleur* Court concluded that "the conclusive presumption embodied in these rules, like that in *Vlandis*, is neither 'necessarily [nor] universally true,' and is violative of the Due Process Clause." *Id.* at 646.

It is submitted that the Court of Appeals' conclusion that the rebuttable presumption doctrine is "co-extensive with the equal protection clause" and has been limited by the Second Circuit Court of Appeals to "suspect classifications or fundamental interests" is erroneous.

In *Trafelet* v. *Thompson,* 594 F.2d 623, 629 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979), this Court expressed its "uncertainty concerning the scope and continuing force of the doctrine of irrebuttable presumptions." This Court's doubts were based solely on the fact that it had failed to mention the doctrine in cases where, conceivably, it could have. It is almost certain that the reason for this is simply that the parties did not raise the issue; this Court will not go out of its way to search for constitutional issues that are not raised by the parties. If the issue had been raised, this Court surely would have felt compelled to either address the issue on its merits or to announce the death knell of the doctrine. It is virtually inconceivable that this Court would abandon a constitutional doctrine of recent vintage *sub silento.*

In the instant case, neither the constitutional provision nor the judiciary law expresses a legislative purpose behind the mandatory retirement age. If one assumes, however, that the purpose is to keep physically or mentally incapable judges off the bench, then the statutes are faulty in impermissibly creating an irrebuttable presumption that judges over the age of seventy are physically or mentally incapable. That presumption is neither necessarily nor universally true.

> A longstanding consensus in the medical community holds that age, even old age, is not to be trusted as a definitive statement of job ability. In 1974 an AMA committee announced: 'Chronological age has been observed to have no magic in terms of judgment, ability, and physical dexterity. Individuals may lose these qualities at age forty or retain them past eighty and [therefore retirement] should be based on the in-

> dividual's competence and ability, not age.' . . . . Because of the poor 'fit' between age and job ability, setting a presumptive age will carry an over-inclusive impact on individuals.

Note, *Age Discrimination in Retirement,* 8 Am. J. L. & Med. 443, 447 (1984) (quoting American Medical Association, Committee on Aging, 230 J.A.M.A. 1312 (1974)).

In *Malmed* v. *Thornburgh,* 478 F. Supp. 998 (E.D.Pa. 1979), *rev'd,* 621 F.2d 565 (3d Cir.), *cert. denied,* 449 U.S. 955 (1980), the Court examined a provision of the Pennsylvania State Constitution which required judges of the Court of Common Pleas to retire at age 70. The principle justification advanced by the State in defense of the rule was "the removal of unfit judges from the bench by means of mandatory retirement at age seventy." 478 F. Supp. at 1008. While conceding that that purpose was "undeniably legitimate," the District Court found that "[i]t is clear that the presumption we are concerned with is true in neither all nor even most cases. The evidence showed, not surprisingly, that the age at which a person's intellectual abilities and physical stamina are lost or diminished is a highly individual matter." 478 F. Supp. at 1008. Thus, the Court held:

> It may be that *some* judges are incapable of effectively performing their duties when they reach 70, and some may even lose their abilities substantially before that time. Nevertheless, it is wholly unnecessary to trample on the rights of all who reach a given age merely in order to weed out the few who are no longer fit. Such an approach violates due process, especially where, as here 'the State has reasonable alternative means of making the crucial determination.' *Vlandis* v. *Kline,* supra, 412 U.S. at 452, 93 S.Ct. at 2236.

Id. 478 F. Supp. at 1009-1010.

On appeal, the Third Circuit found the District Court had been in error when it held that the mandatory retirement rule was based on a presumption that judges over the age of seventy were incompetent. Instead, the Circuit Court examined in detail the legislative history of the mandatory retirement provision, and particularly the records of the Pennsylvania Constitutional Convention of 1967, and found that the drafters of the Constitution had adopted the provision for four valid reasons referred to *supra,* that did not involve irrebuttable presumptions. It is submitted that those four reasons are not applicable to the New York mandatory retirement provisions at issue herein, and that the irrebuttable presumption analysis of the District Court in *Malmed* should be controlling.

In the first place, the legislative history of the New York mandatory retirement provision, *supra,* demonstrates that that provision, in contrast to the Pennsylvania constitutional provision at issue in *Malmed,* is not based on valid rational reasons as articulated by a constitutional convention. Instead, the sole reason put forth by the drafters of the New York constitutional provision is the Biblical dogma that an individual's productive life is to be measured at "three score and ten years."

The mandatory retirement age of 70 years for judges and justices was added to the New York State Constitution for the first time as Section 13 of the Judiciary Article of 1869, which provided that "no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age." New York State Constitutional Convention Committee, New York State Constitution Annotated, Vol. I, Part II at 80 (1938).

At the Constitutional Convention of 1894, several delegates argued that "the age of seventy years is too early a period to lose the services of a lawyer who has been educated upon the bench and has become a competent judge," Revised Record of the Constitutional Convention of 1894, Vol. II at 1153 (1900) (remarks of Mr. Veeder), and that "[i]t is not a question of age, it is a question of ability to perform the duties of the office," *id.* at 1156 (remarks of Mr. Smith). When called upon to justify the 70-year old age limit, the Chairman of the Judiciary Committee replied, in full, as follows:

> Mr. Chairman, according to Holy Writ, it is the natural right of man to consider that he has lived his allotted length of days when he reaches the age of seventy. That great principle has been recognized in the judicial system of the United States. We found it in the Constitution of this State, and we have left it as it was.

Id. at 1153 (remarks to Mr. Root).

Nevertheless, a proposed amendment to raise the retirement age to 75 was defeated by a vote of 63 to 44, *id.* at 1157, and the mandatory retirement age for judges and justices was continued at age 70 under Art. VI, Section 12 of the Constitution of 1894.

The Constitutional Convention of 1938 again considered raising the mandatory retirement age to 75. Revised Record, New York Constitutional Convention 1938, Vol. III at 1978-82. The chairman of the Judiciary Committee opposed the amendment and stated: "Now, the age of 70 for retirement has long been on the statute books, and it corresponds to Scripture threescore years and ten." *Id.* at 1978 (remarks of Mr. Sears); *see also* Journals and Documents,

New York State Constitutional Convention 1938, Document No. 8 at 4 (Report of the Committee on the Judiciary). The proposed amendment was defeated, III Revised Record, *supra*, at 1982, and retirement of judges and justices at age 70 was incorporated in Art. VI, Sections 20 and 21.

The judiciary article of the Constitution was repealed in 1961 and a new judiciary article adopted in its stead. The changes in the new article dealt mainly with the area of the reorganization and partial unification of the court system. The 70-year old mandatory retirement provision was readopted, with no substantive changes and with little or no debate, as Art. VI, Section 25(b).

It is possible to imagine that the mandatory retirement provision may have had some validity when it was first enacted in 1869. In Massachusetts, the first state to collect vital statistics systematically, life expectancy in 1850 was only 38.3 years for males and 40.5 years for females. W. Peterson, *Population* 579 (3d ed. 1975.) For persons born in 1900, the average life expectancy in the United States was 47.3 years. United States Department of Health and Human Services, Vital Statistics of the United States 1979, Vol. II, Part A, Table 6-5. For those born in 1979, the average life expectancy was 73.7 years, *Id.*, and the remaining life expectancy of a seventy-year-old individual in 1979 was 13.4 years. *Id.*, Table 6-3. In other words, the average life expectancy has increased by more than 25 years (or more than 50%) with no corresponding increase in the mandatory retirement age.

The *dicta* expressed in earlier New York cases, *People* v. *Gardner*, 45 N.Y. 812, 819 (1871), and *People* v. *Brundage*,

78 N.Y. 403, 406 (1879), reflects the experience of a society in which life expectancy was less than 47 years. Those cases should be afforded no more deference by this court, more than a century later, than *Scott* v. *Sanford*, 19 Howard 393 (1857), and *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), were afforded by this Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *People* v. *Liberta* 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984), quoting O.W. Holmes, *The Path of the Law*).

Moreover, the four reasons for mandatory retirement cited by the Third Circuit in *Malmed* are not applicable to the provisions at issue herein. The first reason was based on Pennsylvania Rule of Judicial Administration 701, which provided that, upon request, a retired judge "may be designated and assigned by the Chief Justice of the Supreme Court to the office of judge of any court of record to sit temporarily and as directed by the Chief Justice. . . ." The Circuit Court found that "by utilizing senior judges in part-time post-retirement service, the mandatory retirement plan substantially increases judicial manpower by bringing in younger judges while retaining the part-time services of willing and able retired judges," and thus helped to reduce court congestion. *Malmed*, 621 F.2d at 572.

In the first place, it must be said that the Circuit Court's logic is somewhat strained in this instance. If the goal is to increase judicial manpower by retaining the services

of older experienced judges while simultaneously bringing in younger judges, then the straightforward and rational solution would be to eliminate the mandatory retirement provision so that the older judges could continue to serve, and to increase the number of judicial positions so that additional younger judges may be brought in. The method of increasing judicial manpower endorsed by the *Malmed Court* involves a process of (a) compelling judges to retire at age seventy, (b) hiring new judges to fill the vacancies created by such forced retirements, (c) re-hiring the retired judges to perform additional judicial services under the designation of "senior judges," with the net result that (d) there are now two judges where there had been only one. It is submitted that such a circuitous solution to such a straightforward problem defies rationality.

Moreover, assuming that the *Malmed* Court's reasoning is valid, it has only limited application to the New York situation. Art. VI, Section 25(b) of the New York State Constitution and Judiciary Law § 114-115 provide that a former judge of the Court of Appeals or justice of the Supreme Court may be certified to perform the duties of a justice of the Supreme Court upon a finding that he has the mental and physical capacity to perform such duties and that his services are necessary to expedite the business of the Supreme Court. Such certification is valid for a term of two years, and may be renewed for additional two-year terms until the former judge or justice reaches the age of 76.

These provisions differ from the Pennsylvania system in several significant ways. The Pennsylvania rule has no arbitrary cut-off point beyond which a former judge can

no longer serve, while the New York provision has such a cut-off point at age 76. In Pennsylvania every judge who reached the age of 70 and requested assignment to duties as a senior judge was accepted as a senior judge and served as a senior judge. *Malmed*, 478 F.Supp. at 1004. In New York, the administrative board of the judicial conference has nearly unfettered discretion in determining whether to grant applications of retired justices for certification for additional judicial service, and has in fact rejected such applications. *Marro* v. *Bartlett*, 46 N.Y.2d 674, 389 N.E.2d 808, 416 N.Y.S.2d 212 (1979). The 100 percent acceptance rate of applicants for senior judges, combined with the absence of a maximum age for senior judges, does much to alleviate the harshness of the mandatory retirement provision in Pennsylvania. The New York provisions, in contrast, are much more limited in their effect.

In addition, the Pennsylvania certification provisions apply to all retired judges. The New York provisions apply only to retired Court of Appeals and Supreme Court judges; they do not apply to other judges.

The second and third reasons cited by the *Malmed* Court were that "mandatory retirement eliminates the unpleasantness of selectively removing aged and disabled judges" and that the "prevention of harm by a few senile judges more than offsets loss of judges who retain full powers past normal age." 621 F.2d at 572. It is submitted that the Court committed a logical fallacy by assuming that which it sought to prove, viz., that judges become senile at age 70. It is only after that assertion has been proven that one must confront the issue of how to remove senile judges, with a minimum of unpleasantness,

in order to avoid harm to litigants and to the judicial system. If there is no evidence that judges become senile at age 70, then the issue does not arise. Respondents have submitted no evidence of such a problem, and it is submitted that the medical evidence indicates that such a problem does not exist.

Moreover, even if it were proven that some judges become senile at age 70, the simple answer to these concerns is that the constitutional right of the many judges who do not become senile at age seventy cannot be sacrificed out of concern for the few judges who do become senile. This is especially so where, the constitutional infirmity can be easily avoided by handling those judges who do become senile on an individualized basis. New York State Constitution, article 6, § 22(a), provides a mechanism for the forced retirement of a judge or justice on the ground of "mental or physical disability preventing the proper performance of his judicial duties." Section 22(h) provides that a judge or justice so retired "shall be considered to have retired voluntarily,"; thus, the forced retirement is considered non-punitive and imposes no stigma on the judge.

The fourth reason cited in *Malmed* was that the Pennsylvania provision "corresponds with the current trend toward mandatory retirement at seventy in other public and private employment." 621 F.2d at 572. While that might have been true at the time the Third Circuit decided *Malmed,* the trend at the present time is away from mandatory retirement based on chronological age and toward evaluation of individuals based on their individual competence and abilities. The prime example of this is the

recent re-election of the President of the United States for a new four year term which will run until he is age 77. Five of the current justices of the United States Supreme Court are age 76 or over. Federal Judiciary Almanac at 4-6. *See also* "Judge Kaufman—Man of Many Adventures and Challenges," *New York Law Journal,* December 14, 1984, p. 1, col. 3, which noted that Judge Irving Kaufman of the United States Court of Appeals for the Second Circuit at the age of 74, "approaches his responsibilities as a judge and a lawyer with the vigor, enthusiasm, and dedication of a person half his age.

Also relevant to the growing trend away from age discrimination and mandatory retirement is the elimination in New York of challenges for cause of prospective jurors between the ages of 70 and 76, and the elimination of mandatory retirement because of age in both public and private employment.

POINT II

The Mandatory Retirement Provisions Violate Respondents' Right to Equal Protection.

The mandatory retirement provisions violate the equal protection clause of the Fourteeth Amendment by unreasonably discriminating between judges under age 70 and those over age 70; unreasonably discriminating between Court of Appeals and Supreme Court judges, who may be certified for further service until age 76, and other judges who cannot be so certified; and unreasonably discriminating between judges and all other elected and appointed public officials, who are not subject to any mandatory retirement provision.

In *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976), and *Vance* v. *Bradley,* 440 U.S. 93 (1979),

this Supreme Court upheld mandatory retirement provisions against equal protection challenges. The teaching of those cases is *not* that mandatory retirement provisions will always pass constitutional muster; it is simply that, under the facts and circumstances of those particular cases, the standard of judicial review was rationality and the statutes at issue were rationally related to furthering a legitimate state interest.

Murgia concerned a Massachusetts statute requiring retirement of state police officers at age 50. This Court held that because public employment is not a fundamental right and the aged is not a suspect class, the statute should be examined under the rational basis standard. *Murgia*, 427 U.S. at 312-14. This Court found that "[The] nature of the duties to be performed [by state police officers] in all weathers is arduous in the extreme," *Id.*, 427 U.S. at 314 n. 7, and that the mandatory retirement statute rationally furthers the legitimate state interest of "seek[ing] to protect the public by assuring physical preparedness of its uniformed police." *Id.*, 427 U.S. at 314.

Bradley, supra, involved the mandatory retirement of foreign service officers at age 60. This Court found that "the Foreign Service involves extended overseas duty under difficult and often hazardous conditions" leading to "wear and tear on members of this corps." *Id.*, 440 U.S. at 103. The mandatory retirement statute was held to be rationally based because it "minimizes the risk of less than superior performance by reason of poor health or loss of vitality." *Id.*, 440 U.S. at 103.

It will be argued before this Court that the instant appeal should be examined under a standard of strict judicial scrutiny rather than mere rationality. The instant

appellants, unlike those in *Murgia* and *Vance*, were elected as judges. Their mandatory retirement before the expiration of the terms to which they were elected therefore, impairs and dilutes the fundamental rights of the voters who voted for them. This impairment of a fundamental right calls for strict judicial scrutiny.

Trafelet v. *Thompson*, 594 F.2d 623 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979), involved an equal protection challenge to the mandatory retirement of elected state court judges. The Court applied a rational basis test and upheld the mandatory retirement statute. This Court denied certiorari, which does imply approval of the decision and has no significance. Moreover, Justice White in his dissent said that mandatory retirement of elected judges can be "justified only by a compelling state interest" under a strict scrutiny test. *Trafelet* v. *Thompson*, 444 U.S. 906 (1979).

The mandatory retirement provisions at issue herein do not meet even the minimal test of rationality. Unlike the positions at issue in *Murgia* and *Bradley*, the position of judge does not involve arduous physical exertion or difficult and hazardous overseas duty. Thus, the rational bases cited in those cases are irrelevant to the instant case.

The only reason cited by the drafters of the New York mandatory retirement provision was the Biblical dogma of threescore years and ten. That can certainly not be considered a rational basis for upholding the statute today nor are the seven reasons advanced by the New York Court of Appeals. Indeed, the finding by the Court of Appeals that early retirement "avoids the economic burden of testing and removing incapable Judges" is base-

less, as the New York Court Constitution requires *all* judges to be capable of performance.

The second prong of appellants' equal protection argument concerns the unreasonable discrimination between retired Court of Appeals and Supreme Court judges, who may be certified for continued service until age 76 and the other judges who cannot be so certified. This distinction is especially irrational in view of the fact that in New York Civil Court Judges are generally designated as acting Supreme Court Justices with their duties and responsibilities; yet, cannot be certified past the age of 70. It is submitted that the lower court was absolutely correct when it stated (memorandum decision at 19):

> The irrational factor here is rigor for some judges and senseless exclusion of others. The exclusion of Family, Civil and Criminal Court judges from certification privileges, exacerbates the irrationality, especially since those same judges are transferred and assigned acting Supreme Court roles constantly.

Conclusion

Appellants submit that this appeal brings before this Court substantial questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX

Decision of New York State Court of Appeals

64 N.Y.2d 242

Orest V. MARESCA et al.,

Appellants,

v.

Mario CUOMO, as Governor of the State of New York, et al.,

Respondents.

Court of Appeals of New York.

Dec. 31, 1984.

Order of the Supreme Court, New York County, Bruce McM. Wright, J., granted injunctive relief to prevent defendants from retiring plaintiff judges before terms of their office expired. On appeal by defendants, the Supreme Court, Appellate Division, 483 N.Y.S.2d 690, reversed on the law, denied motion for preliminary injunction, and granted cross motion to dismiss complaint. Plaintiffs appealed. The Court of Appeals, Jasen, J., held that: (1) members of the Court of Appeals were not required to recuse themselves but in fact were required to hear and dispose of the appeal under rule of necessity; (2) under applicable rational basis standard of review, challenged provisions mandating retirement of certain state court judges at the end of the year in which age 70 is reached manifestly have rational basis; (3) distinction permitting justices of the Supreme Court and of the Court of Appeals to receive certification for further judicial service until the age of 76, in contrast to those members of the judiciary

serving in lower courts, was justified on the basis of complexity of matters addressed in the appellate courts; and (4) since due process doctrine of irrebuttable presumptions is coextensive with the equal protection clause, and equal protection analysis demonstrated rational basis for the age limitation upon judicial tenure, due process claim failed as well.

Order affirmed as modified.

Joseph O. Giaimo and Peter C. Roth, Forest Hills, for appellants.

Robert Abrams, Atty. Gen., Albany (Arnold D. Fleischer, New York City, Robert Hermann, Albany, O. Peter Sherwood and Howard L. Zwickel, New York City, of counsel), for Mario Cuomo and others, respondents.

Burton C. Agata, Hempstead, for Phyllis Gangel Jacob, respondent.

Dudley Gaffin and Morton S. Minsley, New York City, for Seymour Gerschwer, respondent.

Lewis R. Friedman and Nicholas J. Miglino, New York City, for Charles E. Ramos, respondent.

Michael Colodner, John Eiseman and Barbara Zahler-Gringer, New York City, for Office of Court Administration, respondent.

OPINION OF THE COURT

JASEN, *Judge.*

On this appeal, plaintiff's challenge of State constitutional and statutory requirements that certain Judges of

the State retire at age 70. The challenge is based upon both the equal protection and due process clauses to the Fourteenth Amendment of the United States Constitution.[1]

Plaintiffs Maresca, Rosen, Ramos-Lopez and Wollin are Judges of the Civil Court of the City of New York who have reached the age of 70 in 1984, and pursuant to article VI (§ 25, subd. b) of the New York State Constitution[2] and

1. That members of this court may be affected by the outcome of this appeal does not call for recusal. In the circumstances, inasmuch as this court has exclusive jurisdiction under the Constitution to hear this appeal (art. VI, § 3, subd. b, par [1]) and no other judicial body exists to which this appeal could be referred for disposition, the present members of the court are required to hear and dispose of it under the Rule of Necessity (*Matter of Morgenthau v. Cooke*, 56 N.Y.2d 24, 29, n. 3, 451 N.Y.S.2d 17, 436 N.E. 2d 467). The Chief Judge has recused himself in conformity with his customary practice when, as here, the Office of Court Administration is a party to an appeal.

2. New York State Constitution (art. VI, § 25, subd. b) provides in pertinent part: "Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy."

Article VI (§ 25, subd. b) also provides: "Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office. Any certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six."

section 23 of the Judiciary Law,[3] are compelled to retire on December 31, 1984. Plaintiff Brennan is a Justice of the Supreme Court who will reach age 70 in 1988, and would be compelled to retire on December 31, 1988.

In their complaint, plaintiffs sought judgment: (a) declaring article VI (§ 25, subd. b) of the New York State Constitution and section 23 of the Judiciary Law unconstitutional under the Fourteenth Amendment to the United States Constitution; and (b) enjoining, during the pendency of the action and permanently, defendants Governor Cuomo, Comptroller Regan, New York State Employees' Retirement System, and the Office of Court Administration, from causing the involuntary retirement by reason of age of any of the plaintiffs or any member of the class. At Special Term, plaintiffs moved for a preliminary injunction and defendants cross-moved pursuant to CPLR 3211 (subd. [a], par. 7) to dismiss the complaint. Additionally, at Special Term and on appeal before this court, defendants have maintained that the complaint should be dismissed under the doctrine of laches since plaintiffs should have sought relief prior to the election of Judges to fill their

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3. Section 23 of the Judiciary Law provides in pertinent part: "No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of a village, longer than until and including the last day of December next after he shall be seventy years of age".

Sections 114 and 115 of the Judiciary Law (both added by L. 1962, ch. 704, § 2), provide that Court of Appeals Judges (§ 114) and Supreme Court Justices (§ 115) retired pursuant to article VI (§ 25, subd. b) of the State Constitution may be certified by the Administrative Board of the Courts for continued service upon findings that they have the requisite mental and physical capacity and that their services are necessary to expedite the business of the Supreme Court.

vacancies. Inasmuch as we reach the merits of the case with respect to plaintiff Brennan, as against whom no laches claim can be made, and agree with the determination below, we need not resolve the substantial issue of laches.

By order and judgment entered December 20, 1984, Special Term, New York County, granted plaintiffs' motion for a preliminary injunction, denied the cross motion to dismiss, enjoined the defendants from compelling the retirement of plaintiffs prior to the expiration of their judicial terms of office, directed plaintiffs to continue their work as Judges and ordered the Office of Court of Administration to continue them in their respective titles on its payroll. Special Term specifically held both article VI (§ 25, subd. b) of the State Constitution and section 23 of the Judiciary Law violative of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Defendants, including the Office of Court Administration, immediately took an appeal to the Appellate Division, First Department. The Appellate Division, 483 N.Y.S.2d 690, in a *Per Curiam* opinion, unanimously reversed the order of Special Term, on the law, denied the motion for a preliminary injunction and granted defendants' cross motion to dismiss the complaint. Plaintiffs have pursued an expedited appeal to this court. The action, insofar as it sought a declaratory judgment, should not have been dismissed by the Appellate Division, upon its holding that the provisions in question were constitutional. A declaration to that effect should have been made (*Lanza v. Wagner*, 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670). Accordingly, the order of the Appellate Division should be

modified by declaring article VI (§ 25, subd. b) of the New York Constitution and section 23 of the Judiciary Law constitutional under the Fourteenth Amendment of the United States Constitution and, as so modified, the order of the Appellate Division should be affirmed.

This court is fully cognizant of the arguments that can be made against the wisdom of the challenged provisions; however, for the repeal of such provisions, appeal lies to the ballot and to the legislative processes of democratic government, not to the courts (*Noble State Bank v. Haskell*, 219 U.S. 575, 580, 31 S.Ct. 299, 300, 55 L.Ed. 341 [Holmes, J.]; *United States v. Butler*, 297 U.S. 1, 79, 56 S.Ct. 312, 325, 80 L.Ed. 477 [Stone, J., dissenting]). This constitutes the very core of the democratic process which, under law, proscribes only *unconstitutional* action (Abraham, The Judicial Process [4th ed.], Oxford 1980, pp. 396-397; see, also, Cardozo, The Nature of the Judicial Process, Yale University 1921, p. 141; *Lochner v. United States*, 198 U.S. 45, 74, 25 S.Ct. 539, 551, 49 L.Ed. 937 [Holmes, J., dissenting]). Hence, we observe at the threshold that as a court of law, our only concern is with plaintiffs' claims that the mandatory retirement provisions do violence to the equal protection and due process clauses of the Fourteenth Amendment of the Federal Constitution.

On appeal to this court, plaintiffs contend that the mandatory retirement restrictions are violative of the fourteenth Amendment to the United States Constitution on the grounds that the provisions discriminate between Judges under age 70 and those over age 70, and discriminate against plaintiffs by permitting Justices of the Supreme

Court and Judges of the Court of Appeals to receive certification for service, as Justices of the Supreme Court, until the age of 76, in contrast to those members of the judiciary who serve upon the Civil Court, Criminal Court, Family Court, County Court, Surrogate's Court and Court of Claims, none of whom may be so certified. Also, plaintiffs seek to invalidate the mandatory retirement provisions under the due process clause of the Fourteenth Amendment.

Turning to plaintiffs' first equal protection argument, it is clear that the Judges who have attained the age of 70 do not constitute a suspect class for purposes of equal protection analysis. (See *Vance v. Bradley*, 440 U.S. 93, 96-97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520.) Nor do the constitutional and statutory age restrictions impermissibly interfere with the exercise of a fundamental right. (See *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, *supra; Massachusetts Bd. of Retirement v. Murgia, supra.*) Thus, the challenged provisions are not to be subjected to strict judicial scrutiny, but, rather, to a rational basis standard of review. Pursuant to traditional rational basis analysis, a legislative enactment will pass constitutional muster if the governmental classification is based upon some conceivable and legitimate State interest (*People v. Drayton*, 39 N.Y.2d 580, 385 N.Y.S.2d 1, 350 N.E.2d 377). If any conceivable state of facts will support the classification, said provisions will not be held violative of the equal protection clause (*Matter of Catapano Co. v. New York City Fin. Admin.*, 40 N.Y.2d 1074, 1075, 392 N.Y.S.2d 255, 360 N.E.2d 934, app. dsmd. 431 U.S. 910, 97 S.Ct. 2165, 53 L.Ed.2d 221,

citing *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245). As this court said in *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 218-219, 173 N.Y.S.2d 579, 149 N.E.2d 869). "The principles which are applicable to this case are familiar indeed. Legislative enactments are presumed to be constitutional, i.e., they are presumed to be supported by facts known to the Legislature * * * While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt * * * Particularly apropos is the rule that the law may not be arbitrary and it must be reasonably related to some manifest evil * * * which, however, need only be reasonably apprehended * * * And we must be guided by the familiar principle that 'it is only as a last resort' that courts strike down legislative enactments on the ground of unconstitutionality." (Citations omitted.) A fortiori that reasoning applies where, as here, the validity of a State constitutional provision, rather than a mere ordinance or statute, is adjudged under the Federal Constitution.

The legitimate purpose justifying the provision need not be the primary purpose of the provisions (*McGinnis v. Royster*, 410 U.S. 263, 276, 93 S.Ct. 1055, 1062, 35 L.Ed2d 282)[4] and indeed, a court may even hypothesize the motivations of the State Legislature to discern any conceivable legitimate objective promoted by the provision under attack (*Weinberger v. Salfi*, 422 U.S. 749, 780, 95 S.Ct. 2457, 2474,

4. That the original purpose in the Constitutional Convention may no longer prevail is irrelevant so long as there remains a rational basis.

45 L.Ed.2d 522). The mandatory retirement age limitation for State Judges is rationally related to the promotion of any or all of the following State interests: (1) advancement of general considerations of judicial efficiency (*Rubino v. Ghezzi*, 2nd Cir., 512 F.2d 431, 433, cert. den. 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122); (2) motivation and encouragement of qualified, younger attorneys with judicial aspirations, by this orderly process of attrition (*Rubino v. Ghezzi, supra; Vance v. Bradley*, 440 U.S. 93, 100, 99 S.Ct. 939, 944, 59 L.Ed.2d 171, *supra*); (3) elimination of the unpleasantness and embarrassment of selectively removing aged and disabled Judges (*Malmed v. Thornburgh*, 3rd Cir., 621 F.2d 565, 572, cert. den. 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219); (4) prevention of harm by a few disabled Judges which more than offsets loss of Judges who retain full powers past age 70 (*Malmed v. Thornburgh, supra*); (5) elimination of the administrative burden of testing each Judge attaining the age of 70 to assess competency; (6) avoidance of the economic burden of testing and removing incapable Judges; and (7) the fixing of a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber Judges in the system (*O'Neil v. Baine*, 568 S.W.2d 761 [Mo.]). The challenged provisions mandating retirement at the end of the year in which age 70 is reached manifestly have a rational basis.

The second branch of plaintiffs' equal protection challenge seeks to invalidate the mandatory retirement provisions upon the ground that an associated provision permits Justices of the Supreme Court and Judges of the Court of

Appeals to receive certification for further judicial services until the age of 76, in contrast to those members of the judiciary who serve upon the Civil Court, Criminal Court, Family Court, County Court, Surrogate's Court and Court of Claims, none of whom may be so certified.[5] Due to the complexity and diversity of the judicial grist of Supreme Court (N.Y. Const. art. VI, § 7), certification of Supreme Court Justices and Court of Appeals Judges for service in the Supreme Court is warranted to retain Judges with experience, and to insure an adequate supply of judicial personnel to meet the press of Supreme Court business. With respect to the broad, general jurisdiction conferred upon the Supreme Court, it has been early noted that the court's jurisdiction includes "all cases of every description in law and equity, from the most important and complicated to the most simple and insignificant" (*De Hart v. Hatch*, 3 Hun. 375, 380). Mindful of the State-wide reach of Supreme Court jurisdiction, the absence of maximum monetary limitations upon invocation of Supreme Court jurisdiction, and the conferral of jurisdiction over certain simple or specialized matters upon other courts (see Siegel, N.Y. Prac., § 12), the complexity of Supreme Court matters may rationally be deemed to require greater experience and manpower than are necessary in other courts. Where, as here, significant reasons of fiscal concern and the proper administration of the courts exist, or could conceivably exist, to justify distinctions between judicial offices, the lack of mathematical symmetry within the unified court system

5. This argument cannot, of course, be raised by plaintiff Brennan who, as a Justice of Supreme Court, is permitted to apply for certification upon attaining age 70.

shall be disregarded (*Matter of Tolub v. Evans*, 58 N.Y.2d 1, 8, 457 N.Y.S.2d 751, 444 N.E.2d 1, app. dsmd. 460 U.S. 1076, 108 S.Ct. 1760, 76 L.Ed.2d 337; see *Williamson v. Lee Opt. Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563).

Plaintiffs' argument that mandatory retirement provisions violate the due process clause of the Fourteenth Amendment, by creating an irrebuttable presumption that Judges over the age of 70 are physically or mentally incapable, need not long detain us. The instant case presents neither a classification adopted as an administrative device to serve as evidence of another classification (see *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90; *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63; *United States Dept. of Agric. v. Murry*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767) nor the application of a procedure implicating the fundamental interests of affected individuals such as custody of children (*Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551) of the freedom of choice in matters of marriage and family life (*Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52)—the traditional contexts in which the irrebuttable presumption doctrine has been employed (*Malmed v. Thornburgh*, 621 F.2d 565, 574-575, supra). Under circumstances closely analogous to those herein presented, claims that impermissible irrebuttable presumptions were created were summarily rejected (*Weisbrod v. Lynn*, 383 F.Supp. 933, affd. 420 U.S. 940, 95 S.Ct. 1319, 43 L.Ed.2d 420; *Rubino v. Ghezzi*, 512 F.2d 431, *supra; McIlvaine v. Pennsylvania*, 454 Pa. 129, 309 A.2d 801, app. dsmd. 415 U.S. 986, 94 S.Ct. 1583, 39 L.Ed.2d 884).

Perhaps recognizing that the irrebuttable presumption doctrine may be viewed as a veiled adoption of a rigorous equal protection scrutiny (*United States Dept. of Agric. v. Murry*, 413 U.S. 508, 519, 93 S.Ct. 2832 2838 [Marshall, J., concerning], *supra*; Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv.L.Rev. 1534, 1556), the United States Court of Appeals for the Second Circuit has limited application of the doctrine to those cases involving suspect classifications or fundamental interests (*Johnson v. Lefkowitz*, 2nd Cir., 566 F.2d 866, 869, cert. den. 440 U.S. 945, 99 S.Ct. 1421, 59 L.Ed.2d 633, citing *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583), of which age is not one (see, e.g., *Weiss v. Walsh*, 324 F.Supp. 75, affd. 461 F.2d 846, cert. den. 409 U.S. 1129, 93 S.Ct. 939, 35 L.Ed.2d 262). Since the due process doctrine of irrebuttable presumptions is coextensive with the equal protection clause (*Trafelet v. Thompson*, 594 F.2d 623, 630; *Johnson v. Lefkowitz, supra*), and our foregoing equal protection analysis demonstrates a rational basis for the age limitation upon judicial tenure, plaintiffs' due process claim is without merit.

It is not within the province of the judiciary to balance the advisability of a lawfully implemented public policy against the hardship or illogic it may be said to impose. This is especially true in the instant case where the policy at issue, expressed in a constitutional provision, directly manifests the will of the electorate of the State of New York. Inasmuch as the distinctions embodied in the challenged provisions can be justified as shown above, plaintiffs' constitutional challenge must fail.

Accordingly, the order of the Appellate Division should be modified, with costs to respondents, by declaring both article VI (§ 25, subd. b) of the New York State Constitution and section 23 of the Judiciary Law constitutional under the Fourteenth Amendment of the United States Constitution, and by otherwise dismissing the complaint as to the Office of Court Administration, and, as so modified, the order of the Appellate Division should be affirmed.

JONES, WACHTLER, MEYER, SIMONS and KAYE, JJ., concur.

COOKE, C.J., taking no part.

Order modified, with costs to respondents, in accordance with the opinion herein and, as so modified, affirmed.

Decision of Appellate Division—First Department

Orest V. Maresca, Sidney Rosen, Jose Ramos-Lopez, Michael Wollin, and William C. Brennan,

Plaintiffs-Respondents,

v.

Mario Cuomo, Governor of The State of New York, Edward V. Regan, State Comptroller, New York State Employees' Retirement System, Policemen's and Firemen's Retirement System, New York State Office of Court Administration, New York City Board of Elections, Phyllis Gangel Jacob, Antonio I. Brandveen, Carol Aaronoff, Robert Silverson, Richard Gugliatto, Philip C. Modesto, Seymour Gerschwer, Sidney B. Levitt, Charles Ramos, Wilson Graves and Enrique Calderon,

Defendants-Appellants.

Supreme Court, Appellate Division,
First Department.

Jan. 3, 1985.

An order of the Supreme Court, New York County, Bruce Wright, J., granted injunctive relief to prevent defendants from retiring plaintiff judges before termination of their office expired. On appeal by defendants the Supreme Court, Appellate Division, held that state constitutional provision requiring mandatory retirement of judges in the year they reach age 70 and Judiciary Law provision implementing such retirement requirement was

supported by rational basis, and offended neither due process nor equal protection.

Order reversed on law; motion for preliminary injunction denied, and cross motion to dismiss complaint granted.

Joseph O. Giaimo, Forest Hills, of counsel (Giaimo & Vreeburg, Forest Hills), for plaintiffs-respondents.

Lewis R. Friedman, New York City, of counsel (Nicholas J. Miglino, New York City), for defendant-appellant Charles Ramos.

Dudley Gaffin, New York City, of counsel (Gaffin & Mayo, P.C., New York City), for defendant-appellant Seymour Gerschwer.

Arnold D. Fleischer, Asst. Atty. Gen., of counsel (Robert Abrams, Atty. Gen.), for defendants-appellants Mario Cuomo, Edward V. Regan and the Retirement System.

John Eiseman, New York City, of counsel (Michael Colodner, New York City) for the Office of Court Admin.

Emilio Nunez, New York City, for intervenor Phyllis Gangael Jacob.

Before Murphy, P.J., and Sandler, Ross, Asch and Kassal, JJ.

Per Curiam.

In this action involving mandatory retirement of judges at age 70, defendant State officials (other than the Office of Court Administration) appeal from an order of the Supreme Court, New York County, entered December

20, 1984 which *inter alia* (1) granted plaintiffs' motion for a preliminary injunction, (2) denied the cross-motion to dismiss, (3) enjoined the defendants from retiring the plaintiffs before the termination of their judicial offices expired and (4) directed the plaintiffs, who are 70 years of age, to continue their work as judges, and to stay on the Office of Court Administration payroll.

This action is, in the terms of Justice Wright, a "frontal assault" on the State constitutional and statutory requirements that judges of the State retire at age 70. The challenge is based on the United States Constitution's 14th Amendment—both the equal protection of the law and the due process clauses therein.

It apppears that all but one of the judicial plaintiffs, Orest Maresca, Sidney Rosen, Jose Ramos-Lopez and Michael Wollin, are judges of the Civil Court in New York City and attained the age of 70 in 1984. Consequently, by the challenged provisions, they will be required to retire at the end of the year. The fifth plaintiff, William Brennan, a Justice of the Supreme Court in Queens, will only attain 70 years in 1986.

The order to show cause instituting the present action was signed November 19, 1984 and sought a preliminary injunction against the plaintiffs being required to retire at age 70. The State defendants, other than the Office of Court Administration, moved to dismiss the complaint for failure to state a cause of action.

Justice Wright granted plaintiffs' motion, and denied defendants' cross motion. He found that the New York State constitutional provision, Article VI, § 25(b), requiring mandatory retirement of judges in the year they reach

age 70, violated both the due process and equal protection clauses of the 14th Amendment. Also held in violation was the corresponding provision of the Judiciary Law, Section 23, implementing the retirement requirement. Both were deemed invalid under the Federal constitutional provisions because the plaintiffs or judges would be discharged without evidence of diminished ability to serve in their offices. The Court rejected the arguments of defendants that the plaintiffs had delayed too long in presenting the challenge. Mandatory judicial retirement at age 70 in New York was seen as a prohibited discrimination. Justice Wright distinguished *Rubino v. Ghezzi*, 512 F.2d 431 (2nd Circuit, 1975), *cert. den.* 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975), which upheld mandatory retirement for New York judges. He felt that the decision was "clinging" to an outdated concept. Further, he noted that there was a public interest in continuing able judges beyond the specified retirement age. Accordingly, a preliminary injunction was granted on the grounds that there was irreparable harm threatening the plaintiffs, and a balancing of equities weighed in their favor. In sum, the court rejected a blanket disqualification based on age alone.

The issue on appeal is simply whether mandatory retirement for certain State court judges in New York at age 70 violates either the due process or equal protection clauses of the 14th Amendment to the United States Constitntion.

The basic retirement provision here is the New York State Constitution, Article VI, Section 25(b), which reads in full:

> b. Each judge of the court of appeals, justice of the supreme court, judges of the court of claims, judge

of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six. A retired judge or justice shall be subject to assignment by the appellate division of the supreme court of the judicial department of his residence. Any retired justice of the supreme court who had been designated to and served as a justice of any appellate division immediately preceding his reaching the age of seventy shall be eligible for designation by the governor as a temporary or additional justice of the appellate division. A retired judge or justice shall not be counted in determining the number of justices in a judicial district for purposes of section six subdivision d of this article.

Judiciary Law, Section 23 tracks the State Constitution and implements it. In *Rubino v. Ghezzi, supra,* the same constitutional and statutory provisions were considered

and an attack on their constitutionality was rejected. That court, considering the Federal Constitution, found no violation of the due process or the equal protection clause. It saw no substantial constitutional issue and affirmed the dismissal of the complaint by a single Federal judge, rather than convening the then (constitutional) three-judge Federal District Court. The Second Circuit stated that ". . . the issue of age restrictions upon the term of office of state judges is properly one for the legislative or electoral processes of the State of New York and that the efforts to clothe it in constitutional garb is frivolous", 512 F.2d at 433. The decision in *Rubino* was based on several United States Supreme Court decisions, particularly *McIlvaine v. Pennsylvania*, 415 U.S. 986, 94 S.Ct. 1583, 39 L.Ed.2d 884 (1974). See, also *Weisbrod v. Lynn*, 383 F.Supp. 933 (D.D.C.1974), *aff'd*, 420 U.S. 940, 95 S.Ct. 1319, 43 L.Ed.2d 420 (1975).

We agree with the holding and reasoning of the *Rubino* decision, *supra*. *Rubino* has never been overruled, and has been cited with approval. Of course, New York courts can invoke greater protection than just that found in the federal Constitution, using similar or indeed the exact language of the State Constitution. *Cooper v. Morin*, 49 N.Y.2d 69, 79, 424 N.Y.S.2d 168, 399 N.E.2d 1188 (1979). However, this is obviously not applicable to the present case where a provision of the State Constitution itself is involved and itself specifies the challenged retirement age. The "irrebuttable presumption" argument of the plaintiffs—assuming unfitness of all judges at 70—was considered in *Rubin, supra*, 512 F.2d at 433, footnote, and rejected.

Further support for upholding mandatory retirement at age 70 for judges can be found in *Malmed v. Thornburgh*, 621 F.2d 565 (3d Circuit, 1980), *cert. den.* 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980). That Federal Appeals Court upheld the Pennsylvania provision providing for mandatory retirement at age seventy of state court judges as promoting several desirable policies and also rejected the "irrebuttable presumption" argument. Supra, at 573 *et seq.* The *Malmed* decision saw the reasons for the retirement system as fourfold, *supra*, at 572:

> First, by utilizing senior judges in part-time post-retirement service, the mandatory retirement plan substantially increases judicial manpower by bringing in younger judges while retaining the part-time services of willing and able retired judges. The legislative interest in reducing court congestion is certainly a legitimate state interest.
>
> * * *
>
> The second reason, that mandatory retirement eliminates the unpleasantness of selectively removing aged and disabled judges, and the third reason, that prevention of harm by a few senile judges more than offsets loss of judges who retain full powers past normal age, may be considered together.
>
> * * *
>
> In addition, the convention could rationally place a premium on avoiding the unpleasantness and public humiliation associated with individual removal.
>
> * * *
>
> Fourth, the provision conforms to the recommendations of the American Bar Association, the Pennsylvania Bar Association, and the National League of

Cities, and corresponds with the current trend toward mandatory retirement at seventy in other public and private employment.

While the above considerations were specifically addressed at the Pennsylvania Constitutional Convention adopting the challenged provision there, there is no reason not to apply them (insofar as relevant) to the similar New York Constitutional provision. They need not have been specifically mentioned in the legislative history or background. The Pennsylvania rationale is as valid for New York, as if it had been expressed by or to the New York State Constitutional Convention. Accordingly, it is quite clear that there is a rational basis for the classification contained in the provisions under attack, and that is all that is legally required to uphold them. (Strict scrutiny, or a suspect classification is not involved—such as race.)

In sum, there have been many challenges to mandatory retirement of judges at age seventy, but all have been unsuccessful. See, generally Annotation—Retirement Based On Age, 81 A.L.R.3d 811, 828-830, § 5 (Judges).

Finally, it should be recognized that the State Constitution's Article 6, § 25, subd. b provision for two-year certifications of Supreme Court justices at age seventy and above, is not involved in the present action. This exception to absolute retirement was given by Justice Wright as an example of the supposed irrationality of the state policy here. In this regard, there is nearly unfettered discretion in state officials in determining whether to grant the application of a retired justice for additional service. *Marro v. Bartlett,* 46 N.Y.2d 674, 416 N.Y.S.2d 212, 389

N.E.2d 808 (1979). New York can rationally determine that the services of higher court jurists is more valuable than that of those in courts of limited jurisdiction. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). Pennsylvania uses a variation of this by providing for part-time service from senior judges. 621 F.2d at 572, *supra*, pp. 692, 693. Finally, similar to New York, a Utah statute requiring trial judges to retire at age seventy, and State Supreme Court Justices at seventy-two, was upheld in *Nelson v. Miller*, 25 Utah 2d 277, 480 P.2d 467 (1971).

Accordingly, the order of the Supreme Court, New York County, entered on December 20, 1984 should be reversed, on the law, without costs, the motion for preliminary injunction should be denied and the cross-motion to dismiss the complaint granted.

Order, Supreme Court, New York County, entered on December 20, 1984, unanimously reversed, on the law, without costs and without disbursements, the motion for preliminary injunction and related relief denied, and the cross-motion to dismiss the complaint granted. The motion to vacate the statutory stay is denied; the motion for class action status and related relief is denied; the application for leave to intervene on behalf of Jacob is granted; and the application for leave to intervene on behalf of Kaplan, Darrigrand and Mainzer is denied.

All concur.

Order of New York Supreme Court Special Term

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the Court House, 60 Centre Street, Borough of Manhattan, City of New York, on the 20th day of December, 1984.

Present:

HON. BRUCE McM. WRIGHT,
Justice.

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN and WILLIAM C. BRENNAN,

Plaintiffs,

against

MARIO CUOMO, GOVERNOR OF THE STATE OF NEW YORK, EDWARD V. REGAN, STATE COMPTROLLER, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES and ENRIQUE CALDERON,

Defendants.

On reading and filing the Order to Show Cause on plaintiffs' motion for a preliminary injunction signed by

Honorable Justice Thomas J. Hughes, dated November 19, 1984; the affirmation of Orest V. Maresca in support of the motion, dated November 19, 1984; the complaint dated November 16, 1984; the Notice of Cross-Motion to Dismiss the Complaint of all State defendants except the New York State Office of Court Administration, dated December 6, 1984; the affirmation of Arnold D. Fleischer, in opposition to the motion and in support of the cross-motion, dated December 6, 1984; the affidavit of Barbara Zahler-Gringer, sworn to on the 12th day of December, 1984, setting forth the position of defendant New York State Office of Court Administration with respect to the motion and cross-motion; the reply affirmation of Peter C. Roth in support of the motion and in opposition to the cross-motion, dated December 17, 1984; and after hearing Joseph O. Giamo, Esq., of counsel for the plaintiffs, in support of the motion and in opposition to the cross-motion, and Arnold D. Fleischer, Esq., of Counsel for the State defendants, in opposition to the motion and in support of the cross-motion, and Barbara Zahler-Gringer, Esq., of counsel for defendant New York State Office of Court Administration taking no position on the motion or cross-motion, and on filing the memorandum decision of Honorable Bruce McM. Wright, dated December 17, 1984, and due deliberation having been had,

Now, on motion of GIAMO & VREEBURG, attorneys for the plaintiffs, it is ADJUDGED that the State Constitution's mandatory retirement provisions for judges and justices is invalid as being violative of both due process and the

equal protection clause of the Fourteenth Amendment to the U.S. Constitution, and it is

ORDERED that the motion be and the same is hereby granted, it is further

ORDERED that the cross-motion to dismiss the complaint for failure to state a cause of action be and the same is hereby denied and, it is further

ORDERED, ADJUDGED AND DECREED that defendants are enjoined from retiring the plaintiffs before the expiration of their terms of office by reason of age, and, it is further

ORDERED that the plaintiffs who have become 70 years of age are directed to be continued in their respective titles and work as judges and maintained on the Office of Court Administration payroll until further order of this or any other court of competent jurisdiction.

ENTER:

/s/ (Illegible)

J.S.C.

NORMAN GOODMAN
Clerk

FILED
DEC 20 1984
COUNTY CLERK'S OFFICE
NEW YORK

Memorandum Decision of Wright, J.

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I, NEW YORK COUNTY
at the Courthouse thereof,
60 Centre Street,
New York, New York 10007.

Present:

HON. BRUCE McM. WRIGHT,
Justice.

OREST V. MARESCA

against

MARIO CUOMO

The following papers numbered 1 to 7 read on this motion, ARG. AND SUB. No. 157 on Calendar of DEC 10 1984:

	PAPERS NUMBERED
Filed—Order to Show Cause—and Affidavits Annexed	1 & 2
Answering Affidavit & Motion	4–6
Replying Affidavit	
..... Affidavit	
..... Affidavit of Service	3
Pleadings—Exhibit	
Stipulation	7
Filed Papers	

Memorandum Decision of Wright, J.

Upon the foregoing papers this motion is granted and the cross-motion is denied for the reasons stated in the accompanying memorandum decision. Submit order.

Dated DECEMBER 17, 1984

/s/ (Illegible)
J.S.C.

Briefs: Plaintiff's X Defendant's X Petitioner's .....
Respondent's ..... Relator's .....

Briefs .....

County Clerk's No. 26682, 1984
(Illegible)

Decision of Special Term

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 26682—1984

MOTION #157, DEC. 10, 1984

SPECIAL TERM, PART I

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN, and WILLIAM C. BRENNAN,

Plaintiffs,

against

MARIO CUOMO, GOVERNOR OF THE STATE OF NEW YORK, EDWARD V. REGAN, STATE COMPTROLLER, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES and ENRIQUE CALDERON,

Defendants.

BRUCE MCM. WRIGHT, J.

In a frontal assault upon forced retirement of judges and justices of the courts of the City and State of New York, in the year that they reach the age of 70, plaintiffs seek an order granting the following preliminary relief:

Decision of Special Term

An injunction enjoining and restraining the defendants* from causing the involuntary retirement of plaintiffs, or of any other member of the class of judges and justices of the State of New York, or any subdivision thereof, on account of their having reached the age of seventy, on the ground that mandatory retirement at said age is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

The papers before the court evoke conflicting images of discriminations based upon age; automatically discarding public servants upon their survival until seventy, without regard to their health or competence; and ignoring the advances of science, human longevity and usefulness; and whether or not such a mandatory retirement rule is arbitrary and so irrational as to reveal Constitutional infirmities that demand judicial nullification.

During argument of the motion, counsel for plaintiffs allowed his professional analysis to suggest that there is a dangerous and puritanical clinging to Biblical anxiety in using a three-score and ten measurement of human time to determine a mandatory date for retirement. There are also shadowy concepts of established religious allowance and a tithing of years.

Also raised is the very serious question of the value of an elector's vote. While this argument does not reach the status of those who were appointed to the Criminal and Family Courts, plaintiffs were elected to their respective offices. They were elected for terms that expire

* The action has been discontinued as against the New York City Board of Elections.

long after they reach the age of seventy. Does the mandatory retirement rule thus deprive voters who elected bench candidates for specific terms?

True, it is that the longest life is but the wink of eternity's eye. And, as Palinurus pronounces in *The Unquiet Grave,* life is a terminal disease, and one needs eternal youth to out-race the stealth of time. Here, Palinurus echoed the weeping Seneca.[1] Both famous and anonymous commentators, through the ages, have engaged the mystery of age, its joys and its burdens. Today, the italics of existence celebrate youth. Suppressed are the syllables that honor living elders. Forgotten or neglected are such wisdoms as those expressed in T.S. Elliot's essay, *The Sacred Wood.* There, a *neo* brags that "we know so much more" than the ancients. And a sage replies, "Precisely, and they are that which we know."

Euripides deplored the menance of years. "What else," he asked, "is an old man but voice and shadow?"[2]

Ecclesiastes makes old age the loosening of a silver cord; the fracture of a golden bowl; the disintegration of the wheel, broken at the cistern.[3] To some, we of many years become "Bare ruined choirs where late the sweet birds sang."[4] But even in the time of the Bard when plagues and epidemics ravaged a pre-penicillin time of jeopardy, he could nevertheless note Lear's "Fourscore

1. *Ad Lucilium,* Epistle, cviii.
2. *Melanippe,* Fragment 18.
3. 12: 1-7.
4. Shakespeare, *Sonnets* LXXIII.

and upward,"[5] although this is perhaps an inappropriate analogy for judges, in view of Lear's loss in mental pause.

Robert Louis Stevenson finds in age no treasured island: "By the time a man gets well into the seventies his continued existence is a mere miracle."[6]

Logan Pearsall Smith finds humor in a blunt mirror and reminds us that "There are people who, like houses, are beautiful in dilapidation."[7] Plaintiffs, of course, bulging with life and wit and full of useful potential, find in mandatory retirement sufficient reason to brood with Juvenal that "old age [is] more to be feared than death."[8]

In these days of vitamins, health foods, Geritol, Blue Cross-Blue Shield, it is an indictment of survival to say that seventy is old. Robert Herrick, despite the fact that he was old, wrote that he was, however not "yet grown cold; I can play, and I can twine / Bout a virgin like a vine; * * *."[9]

As though perceiving this dispute from the vantage point of the Nineteenth Century, Tennyson observed that: "Old age hath yet his honour and his toil; / Death closes all: but something ere the end, / Some work of noble note, may yet be done, / Not unbecoming men that strove with Gods."[10]

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5. King Lear, IV.vii.
6. *Aes Triplex.*
7. *Afterthoughts.*
8. Satires XI.
9. *Hesperides: On Himselfe.*
10. *Ulysses.*

With these extra-judicial concerns as back-drop, the plaintiffs' application will be considered and measured against such law as appears applicable.

The wisdom of the State Legislature, with its focus on age, makes it an unlawful discriminatory practice "For an employer * * *, because of the age, * * * of any individual, * * * to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." (§296, Executive Law). Clearly, the State is plaintiff's employer.

> "The term 'employer' as used in §296 [Executive Law] is intended to be interpreted in its accepted and dictionary meaning (*Matter of Board of Higher Educ. v. Carter*, 14 N.Y. 2d 138, 147)."
>
> (*State Div. of Human Rights v. Bd. of Cooperative Education Services*, 98 App. Div. 2d 958).

In essence, the position of plaintiffs is that the circumstance of age, without more, is not a valid occupational qualification.[11]

How, then, do the defendants justify the mandatory and involuntary retirement rule for judges employed by the State?

[I] The New York State Constitution:

Article 6, §25(b) of New York's Constitution provides that each judge of the Court of Appeals, justices of the

11. And see *Carey v. N.Y. State Human Rights Appeal Bd.*, 61 App. Div. 2d 804; aff'd. 46 N.Y. 2d 1068, appeal dismissed, 444 U.S. 891, 100 S.Ct. 198, 62 L. Ed. 2d 128.

Supreme Court, judges of the Surrogate's Court and judges of New York City's courts, "shall retire on the last day of December in the year in which he [or she] reaches the age of seventy." All of the plaintiffs, except Brennan, became seventy in 1984. Brennan, a Supreme Court justice, becomes seventy in 1988. In each instance, plaintiffs have or will have reached the age of seventy before the end of their elective term as a judge or justice.

§23 of the Judiciary Law is cross-referenced with Article 6, §25(b) of the State Constitution, and makes the same statement of forced retirement of judges and justices at the age of seventy—whether elected or appointed. In an opinion by the State's Attorney General, it was said that the mandatory retirement of judicial officers because of age causes the term of office to be shortened and terminated, if the judge or justice becomes seventy prior to the normal expiration of an elective or appointive term (1964, Op. Atty. Gen. 76).

Both Article 6, §25(b) of the Constitution and §23 of the Judiciary Law, plaintiffs contend, are unconstitutional, as denials to them of due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution. A declaratory judgment to that effect is sought, along with both preliminary and permanent injunctive relief, restraining implementation of the mandatory retirement provisions. In effect, plaintiffs urged, they are being wrongfully discharged for the offense of surviving to the age of seventy, without any evidence of diminished ability to execute their judicial duties.

Confronted with these arguments, defendants have cross-moved to dismiss the complaint pursuant to Rule

3211(a)(7), CPLR, alleging that it is a pleading that fails to state a cause of action.

Because the original return date of plaintiffs' application was November 30 and they sought and were given an adjournment to December 10, 1984, defendants find in that circumstance an absence of the irreparable injury that is the *sine qua non* justifying preliminary injunctive relief. The weakness of that objection notwithstanding, defendants become more substantive by contending that there are linked conditions precedent that must be met before entitlement to the drastic relief of the sought restraint can be shown, including a likelihood of success on the merits in terms of balanced equities.

Annexed to the Attorney General's memorandum of law are two exhibits. Both relate to the continued service beyond the age of seventy for judges of the Court of Appeals and justices of the Supreme Court. Neither of the exhibits addresses the exception of Family Court, Surrogates Court, Criminal Court and Civil Court judges from the extended service provisions of the Constitution, upon proper certification.

Defendants point to those who presumed that the ages of the Civil Court plaintiffs created vacancies. They campaigned successfully to succeed plaintiffs, in reliance upon the Constitution of the State. Their claims to the judicial offices, say the defendants, clearly outweigh the claims here of unconstitutionality made by plaintiffs. But what defendants are really saying is that plaintiffs are tardy with their process and that they should have commenced this action earlier since they were necessarily aware of

the mandatory retirement laws long before the elections were held.

Presumably, defendants are saying that plaintiffs should have sought to enjoin the election itself until resolution of their claims of unconstitutionality. It is never too late for unconstitutionality.

Delay, of course, is a proper influence upon the exercise of discretion in entertaining a petition otherwise sound. In *Matter of Kupferman v. Katz,* (19 App. Div. 2d 824, 825), the First Department found the delay in seeking a judgment declaring a Local Law invalid, persuasive in denying the petition. As the court said, "The delay in bringing the proceeding has not been adequately explained." The absence of explanation and the delay were found to be not justified and harmful. And, as the court continued:

> "Inexcusably delayed proceedings in election matters coming to judicial determination close to the eve of the polling are especially not to be encouraged."

The Court of Appeals affirmed (13 N.Y. 2d 932).

During the same term, the identical bench denied injunctive relief where a local law was submitted to the voters, because the ballots had already been printed by the time the proceeding was begun (*Matter of Young v. Wagner,* 19 App. Div. 2d 825, affirmed 13 N.Y. 2d 934). Significantly, in *Young,* the Court of Appeals very carefully pointed out that the Appellate Division did not abuse its discretion in denying the petition, in view of the delay. "We reach no other question," the court concluded.

Both sides point to *Malmed v. Thornburgh*, 621 F.2. 565 [3rd Cir.], cert. den. 449 U.S. 955 (1980). There, Pennsylvania's law mandating retirement of judges at the age of seventy was challenged. The Court of Appeals there rejected the due process and equal protection arguments of the septuagenarian petitioners, citing the traditional disciplines for determiing whether or not due process and equal protection have been honored or breached.

> "* * * a court must determine if the provision rationally furthers *any* legitimate state objective. 'For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision * * *.' *Fleming v. Nestor*, 363 U.S. 603, 612, 80 S. Ct. 1367, 1372, 4 L. Ed. 2d 1435 (1960). The court may even hypothesize the motivations of the State legislature to find a legitimate objective promoted by the provision under attack."

While there can be little quarrel with such general rules, defendants make much of the adoption of Article 6, §25(b) of the State Constitution and offer it some reverence as an "Early step in the unification of the state court system." But, of course, unification is precisely what the statute does not accomplish, since Supreme Court justices and Court of Appeals judges may seek the grace of a discretionary extension of service beyond the age of seventy, possibly until the age of seventy-six.[11a]

11a. Look for rationality or job-related applicability of the age mandate and a Pandora's Box of disjunctive and inconsistent troubles opens to afflict the Unified Court System. For example, City of Rye judges are emancipated from mandatory retirement, and no such artificial stricture retires Housing Judges, or a variety of judges in the up-state hinterlands. Such a hodge-podge defies rationality.

That there has been some disquiet on the subject of mandatory retirement at the age of seventy among legislators themselves, their defeat in seeking change does not affect the issue here (see Record of the 1938 N.Y. State Constitutional Convention, Vol. II, pp. 531-534; Record of the 1967 Constitutional Convention, Vol. IV, pp. 845, 858, 887-889, 947-948).

Defendants cite the 113 year old case of *People v. Gardner*, 45 N.Y. 812, 819. There, the venerable court, divided from today's time of modern comfort and ease it could never know, speculate that "the natural decay of the powers of the man might at times leave upon the bench an inefficient judge." For the harsh and primitive comforts of the time, the lack of medical advances and the absence of miracle drugs, the 1800's were, perhaps a time of a more rapid aging. The mortality tables forecast a life expectancy for beyond the three-score and ten of biblical times.[12] Neither does *People v. Brundage*, 78 N.Y. 404, 406, with its out-of-joint and anachronistic ruminations dating from 1879, aid and abet the defendants' cause.

That the mentioned authorities are passe conclusions is attested by the Constitution itself that allows three two year periods each for certificated judges and justices to serve beyond the age of seventy (Article VI, §25(b), N.Y.

12. At age 65, white males may look forward to 14.2 more years, while black males average 13.3; white females are given 18.7 of longevity, with black females expected to live an additional 17.2 years. At age 70, white males average an additional 11.3 years, with male blacks just under that, at 10.7; white females may expect 15.0 and black females, 13.9 years. These averages, of course, are subject to such modifications as are imposed by individual exceptions and, as juries are instructed, there are no guarantees either way and some may exceed the average forecast while others may find that their road to Samara reaches its dead-end earlier.

Const. §§114, 115, Judiciary Law). That Family, Civil and Criminal Court judges are excluded from the class that may seek certification, under so-called unified court system, defies common sense. This is especially true where so many of those courts have a shared experience with those who were elected justices. The blunt seventy-year constraint, then, defies both aspects of the Oliver Wendell Holmes insight that the life of the law is not logic but experience.[13] Clearly, it is not logic to lump all men together, either as *lumpen proletariat* or *lumpen intellectual.* And yet, the law, that rational invention of humankind to protect its survival from baser instincts, has done precisely that by automatically casting some judges in the discard heap at the magic moment of seventy, while giving some a small delay in facing that prospect.

The seemingly desperate cling to the seventy-year trigger of disqualification makes the same sense as the Captain of the Titanic assuring the passengers that his ship was stopping to take on ice. The Second Oldest Profession that has engaged analysis for so many years, suffers from a tory streak that fears the quickened pace, the bold step that advances both cause and raison détre. "It is revolting," Holmes wrote in 1870, "to have no better reason for a rule of law than that it was laid down in the time of Henry IV."[14] There is no more rational reason for retaining the seventy-year compulsory retirement age than there was for American judges retaining the powdered

13. Holmes, *The Path Of The Law.*

14. Henry Steel Commager, *The American Mind,* Yale, 1950; Ch. XVIII.

peruke. And, of course, in the plain English too often abused by the law's lexicon, the principal test of constitutionality is, does it make sense? Is it rational? Is it supported by some connection with reality? Is it discriminatory?

Plaintiffs urge that equal protection is abandoned and the Fourteenth Amendment is brutally ignored by the mandatory retirement provisions of the State Constitution, by assuming incompetence from the circumstance of a specific age. There is the built-in assumption that Court of Appeals judges and Supreme Court justices are endowed with magic possibilities of competence and are thus entitled to seek certification. Rejected by the constitution's assumption are Family, Civil and Criminal Court judges. At age 69, they possess usefulness. But, incredibly, decay is triggered at age 70.

It represents the kind of discrimination that made the sight of skin color justify the back of the bus, the jim-crow railway car, the black toilet, the denial of public accommodations and the slamming of the church door to bar black access to a white temple.[15] In one case, the sight of color mandated rejection; in the matter at Bar, the fact of age is cited as justification for exclusion. The law, in its ponderous turtle progress overcame (to a modest degree on paper), official color barriers. It is now time to confront the folly of age prejudice as a state protocol.

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15. See *Brown v. Bd. of Education*, 347 U.S. 483 (1954). Theoretically and by way of official judicial philosophy, *Brown* sought to undo the malicious mischief of *Scott v. Sandford* (19 Howard 393 [1857]; and *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Decision of Special Term

Defendants brush aside age as a suspect qualificaion and cite *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 [1976] for the principle that government employment is not a fundamental right. It is further argued that the State Constitutional provisions on mandatory judicial retirement need meet only a rational basis test, as opposed to one of strict scrutiny. But the *Murgia* case made it clear that the court's conclusion might be otherwise where, because of age, there was subjection to "unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." (p. 313) What is more of a stereotyped and generalized characteristic than to say that all Family, Civil and Criminal Court judges are useless for further judicial duty, simply because they survive to seventy while in office? The anomaly is italicized by the saying that for Court of Appeals judges and Supreme Court justices, the system can test their intellectual and physical valence for limited periods of continued service.

Murgia, in any event, dealt with state police officers. Their duties, needless to say, fail to compare with the sedentary and cerebral vocation of a judge. As footnote 7 of page 314 of *Murgia* makes clear, the mandatory retirement age set there for police officers, was "by virtue of the nature of the work demanded of its members," work that "undoubtedly requires comparatively young men of vigorous physique."[16]

16. Even this distinction fails to consider later advances in thought that would not automatically disqualify women from work traditionally, in the past, reserved for males.

Murgia, then, is not dispositive here. Neither is *Vance v. Bradley* (440 U.S. 93 [1979]), where foreign service officers were compelled to retire at age 60. Rationality, again, was the touchstone for analysis of equal protection rights. The rationality in *Vance* was said to be the aim "to stimulate superior performance and to retain only those capable of conducting themselves" in a manner that measured up. There were regular examinations to ensure this policy. At least, individual performance was respected. Here, there are no such regular examinations. That process only occurs at age seventy and then, only for a select few, as opposed to *all* the judges in the Unified Court System.

Trafelet v. Thompson (594 F. 2d 623 [1979]), did raise the issue of mandatory judicial retirement. In sustaining the Illinois statute there, the court pointed to the legislative sense that

> "* * * a mandatory retirement at age 70 will tend to insure a more vigorous judiciary to which the public is entitled."
> [p. 627]

But that is not a rational reason for allowing some judges in the system to seek certification while barring others. The abuse of equal protection finds its genesis in the irrational distinction between judges in the Unified Court System. It is curious that the very judges who have made the rulings are themselves, under their federal appointments, eligible to serve for life.

Whether the strict scrutiny rule be used, or that of rationality as analytical tools, the Fourteenth Amendment

remains in all of its Gibraltar-like substance. Its use today may have caused some surprise in its authors could they but know its multi-invocations. The Amendment was originally conceived to provide American citizenship and equal protection of the law to Negroes, thereby ensuring permanent the provisions of the Civil Rights Bill of 1866.[17] Its latter-day construction embraces as "All persons" the greatest and smallest of corporations. In basic, no-nonsense English, the Amendment's concluding admonition says that no State may "deny to any person within its jurisdiction the equal protection of the laws."

No matter the convolluted philosophical meanderings in judicial speculations through the years, the clarity of "equal protection" emerges as free of ambiguity. Thus, in New York, where rejections based upon age are impermissible, forced retirement at age seventy discloses a prohibited discrimination.

Without regard to individual stamina, vigor and undiminished intellectual energy, an entire class is legislated against. No close scrutiny is needed to discover the flagrant absence of rationality in such a rule. Despite the catalogue of cases noted in the Attorney General's memorandum, *all* of the Federal decisions do not compel defeat of plaintiffs' cause. The Age Discrimination In Employment Act of 1967, §§2 et seq., 11(b), as amended, 29 U.S. C.A., §§621 et seq. 630(b), appears to have some meaning here. The Act permits discrimination only "where age is a *bona fide* occupational qualification reasonably neces-

17. Meyer, XIV *The Amendment That Refused To Die.* And see Linden, *Politics Or Principle* (Congressional Voting On The Civil War Amendments And Pro-Negro Measures, 1838-69).

sary to the normal occupation of the particular business, or where the differentiation is based on reasonable factors other than age." (Section 4(f)(1), 29 U.S.C. §623(f)(1)). Here, only age is the precise concern.

As long ago as 1966, Congress directed the Secretary of Labor to submit legislative proposals for the specific purpose of age discrimination. The result was a draft bill (113 Cong. Record, 1377 [1967]), accompanied by a Presidential message on older Americans, urging passage into law (1 Public Papers, 32, 37 [1967]). After extensive hearings, it was found that, although age discrimination did not have the animus of a racial bias, its genesis, all too often was based largely upon stereotypes unsupported by objective fact; that arbitrary age lines were in fact generally unfounded; and that, as an overall matter, the performance of older workers was at least as good as that of younger ones. Finally, it was concluded that arbitrary age discrimination was profoundly harmful in depriving the national economy of the productive labor of millions of individuals. Found, also, was an infliction of psychological trauma by reason of lost opportunity to engage in productive and satisfying occupations.

Congress declared, among other things:

> "(b) It is therefore the purpose of this [Act] to promote employment of older persons based on their ability rather than age * * *."
>
> (§2, 29 U.S.C. §621, ADEA.)

Originally, the Act was limited to workers between the ages of 40 and 65. §631 raised the age to 70 in 1978.

Nevertheless, the substantive sense remains rated in rationality, to wit, that age must be "a *bona fide* occupational qualification reasonably necessary to the normal operation of the particular business * * *." This is a rule extended to both the Federal and State governments, *qua* employers. The limitation to age 70 does not disturb the rationality doctrine. Compare *Equal Employment Opportunity Commission v. Wyoming*, 103 S. Ct. 1054, for an *in extenso* discussion of the Age Discrimination In Employment Act of 1967, as amended.

Rubino v. Ghezzi, 512 F.2d 431, is a 1975 ruling by the Second Circuit Court of Appeals that clings to the doctrine that the kinds of due process and equal application of the laws contentions raised here are frivolous and present no substantial federal question. But *Rubino* dates from 1975, as does the denial of certiorari by the U.S. Supreme Court (423 U.S. 891). The substantive provisions of *EEOC v. Wyoming, supra* were announced in 1983. In addition, the application of ADEA to both federal and state governments came, with relevant amendments in 1978, some three years after *Rubino*.

In addition, *Rubino* states that "the State could rationally determine" that age 70 for mandatory judicial retirement is "reasonable" (p. 433). Therefore, the question remains, is the statute rational? The defendants continuously place rationality on a presumption that, absent the magical 70 year retirement age, the system would be compelled to face the "unpleasantness of removing senile judges on an individual basis." Not one single evidentiary detail is offered to support the conclusory suggestion that age 70 for a judge automatically spells

senility or incapacity. Application of such a presumption would leave the United States Supreme Court in the hands of at least five incapacitated justices.

As for public interest in compelling the retirement here contested, the public interest is precisely the opposite of retiring those who reach the age of seventy. Assuming a public purse-strings interest, productive septuagenarians save a drain on pension funds or unemployment reserves by contributing to such funds and social security.

The defendants' discussion of certification of Supreme Court justices is fairly meaningless here, except to underscore the irrational discrepancy in a so-called Unified Court System that favors two classes of judicial officers with an opportunity to seek certification beyond the age of seventy, while denying identical opportunity to Civil, Criminal and Family Court judges. Nor is *Trafelet v. Thompson* (594 F.2d 623, cert. den 444 U.S. 906) persuasive in speaking of legislative justification in adopting more rigorous standards for judges than other public officials. The irrational factor here is rigor for some judges and senseless exclusion of others. The exclusion of Family, Civil and Criminal Court judges from certification privileges, exacerbates the irrationality, especially since those same judges are transferred and assigned acting Supreme Court roles constantly. And even those whose power magnets fail to attract the favor of the assigning moguls, generally must preside over §325-d, CPLR cases sent to the Civil Court for trial by the Supreme Court.

So, what is the "reasonable basis" for the law? It fails to disclose itself under the circumstances discussed. It is not so that the law creates an irrebutable presump-

tion as it is that the law cannot be sustained rationally, or as occupationally related. To give such a law the artificial respiration of judicial approval is to sneer at due process and equal protection. Neither course is the office of this court.

The public policy of this State would appear, in 1984 at least, to be that public servant retirement for age is nonsense. Chapter 296 of the Laws of 1984 amends the executive law, retirement, social security and education laws to eliminate mandatory retirement because of age. The governor's memorandum approving the bill demonstrates how far the State has come since the 1871 atavisms of *People v. Gardner* (45 N.Y. 812). He stated:

> "The bill, which is part of my legislative program, removes the ceiling of age 65 presently applicable to prohibition against age discrimination in hiring and employment and prohibits mandatory retirement because of age in both the public and private sectors except in certain narrowly defined instances.
>
> Many of our older citizens desire to work and can make valuable contributions at the workplace, but because of arbitrarily established age limitations have been forced to retire. Enactment of this bill will remove these artificial barriers and allow any able worker to continue working, no matter how old."

And if jurors can no longer be challenged for cause because they are between 70 and 76, why strike down the service of judges of the same age category? By the laws of 1981, ch. 176, §1, §510 of the Judiciary Law was amended to eliminate juror challenge for cause based upon a juror being over 70.

Of course, there is a legitimate State interest in weeding out unfit judges. However, an *en masse* disqualification resting upon age itself, is deprived of all rationality. As there is no universal yardstick for measuring fitness after 70, each judge or justice must fall or survive individually, if due process is to be honored.

Elements of irreparable harm are clearly visible in the deprivation faced by plaintiffs. Elected for terms certain, they now face irreversible truncation of those terms. While public employment may not be an absolute right, judges differ in their employment from other civil servants, both in qualification and *how* they come to their positions. The age disqualification, in effect, nullifies a voter's choice, allowing a vote to achieve but a portion of its purpose. This is hardly equal application of the laws.

Balancing the equities shows a plain tipping in favor of plaintiffs, for the State and the electorate have judges of experience and accumulated knowledge—elements that favor a beneficial effect for those whose disputes must be arbitrated, adjusted or tried.

The court is not unaware of the complex series of reactions that flow from any granting of the sought injunctive relief. Candidates to succeed the plaintiffs (except for Brennan), have campaigned for and won election. On January 1, 1985, they except to begin their official duties. Many will have or have had public inductions. Nevertheless, irrationality runs through the Constitutional like a mountain stream dividing rationality from its opposite. This court will not be party to a condemnation of careers that rests upon artificial circumstances that bear no kinship with rational reality or occupational qualification.

Decision of Special Term

In an enlightened time that brings to bear an analysis that rejects blind disqualification based upon age alone, this may be the season for a leap forward beyond the precedents cited by the defendants.

Times change. Even appellate judges change. In 1949, there was *Dorsey v. Stuyvesant Town Corp.* (299 N.Y. 512), a dispute before its time. In 1943, Metropolitan Life Insurance Co. organized a redevelopment company to build what would become known as Stuyvesant Town. The city used its powers of condemnation to clear large tracts of land for Metropolitan's use. Tax abatements were given to the company. A margin of profit was guaranteed. It was evident that the city had invested its power in support of private actions by private corporations, thus clothing the latter with the character of state action. Despite this, the majortiy of the judges, laboring in the primitive pre-sixties shadows of black powerlessness, found that the relationship between Stuyvesant Town and the City and state was insufficient to "transmute their conduct into state action * * *." (p. 536) [cert. den. 339 U.S. 981, 982].

It would be otherwise today. Thus, plaintiffs have risked their all on the possibilities of judicial change, a different time and a different conclusion on the nettlesome subject of age. The State Constitution's mandatory retirement provisions for judges and justices is an affont to both due process and the equal protection clause of the Fourteenth Amendment to the U. S. Constitution.

The motion is granted. The cross-motion is denied.

Decision of Special Term

Submit an order enjoining defendants from retiring the plaintiffs and directing that plaintiffs who have become 70 years of age be continued in their respective titles and work as judges and maintained on the Office of Court Administration payroll until further order of this or any other court of competent jurisdiction.

The order must be submitted forthwith, so that appellate review can proceed immediately.

Dated: December 17, 1984

/s/ (Illegible)
J. S. C.

Notice of Appeal

STATE OF NEW YORK

COURT OF APPEALS

New York County Index No. 26682/84

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN, and WILLIAM C. BRENNAN,

Plaintiffs-Appellants,

against

MARIO CUOMO, Governor of The State of New York, EDWARD V. REGAN, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES and ENRIQUE CALDERON,

Defendants-Appellees.

SIRS:

PLEASE TAKE NOTICE, that the above-named plaintiffs, Orest V. Maresca, Sidney Rosen, Jose Ramos-Lopez, Michael Wollin and William C. Brennan, hereby appeal to the Supreme Court of the United States from the Order of the State of New York Court of Appeals, entered in the

office of the Clerk of said Court on December 31, 1984, and from each and every part thereof. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: Queens, New York
February 26, 1985

Yours, etc.,

GIAIMO & VREEBURG
Attorneys for Plaintiff-Appellants
Office and P.O. Address
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Affidavit of Service

STATE OF NEW YORK

COURT OF APPEALS

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN, and WILLIAM C. BRENNAN,

Plaintiffs-Appellants,

against

MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES and ENRIQUE CALDERON,

Defendants-Appellees.

STATE OF NEW YORK)
COUNTY OF QUEENS) SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Howard Beach, New York.

That on February 26, 1985 deponent served the within Notice of Appeal on

Affidavit of Service

Robert Abrams, Attorney General of the State of New York, Attorney for Appellees Cuomo, Regan and Retirement System at 2 World Trade Center, New York, New York 10047.

Michael Colodner, Esq., Attorney for Appellee Office of Court Administration at 270 Broadway—Room 1400 New York, New York 10007.

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The address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

/s/ YVONNE GALLIANI

YVONNE GALLIANI

Sworn to me this 26th
day of February, 1985.

/s/ CAMMY CERRATE

CAMMY CERRATE
NOTARY PUBLIC, State of New York
No. 30-4304035
Qualified in Nassau County
Commission Expires March 30, 1986

Notice of Appeal

STATE OF NEW YORK

COURT OF APPEALS

New York County Index No. 26682/84

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN, and WILLIAM C. BRENNAN,

Plaintiffs-Appellants,

against

MARIO CUOMO, Governor of The State of New York, EDWARD V. REGAN, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES and ENRIQUE CALDERON,

Defendants-Appellees.

SIRS:

PLEASE TAKE NOTICE, that the above-named plaintiffs, Orest V. Maresca, Sidney Rosen, Jose Ramos-Lopez, Michael Wollin and William C. Brennan, hereby appeal to the Supreme Court of the United States from the Order of the State of New York Court of Appeals, entered in the office of the Clerk of said Court on December 31, 1984,

and from each and every part thereof. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: Queens, New York
February 26, 1985

Yours, etc.,

GIAIMO & VREEBURG
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Office and P.O. Address
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RECEIVED
MAR—2, 1985
COURT OF APPEALS

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Affidavit of Service

STATE OF NEW YORK

COURT OF APPEALS

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN, and WILLIAM C. BRENNAN,

Plaintiffs-Appellants,

against

MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILLIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES and ENRIQUE CALDERON,

Defendants-Appellees.

STATE OF NEW YORK)
COUNTY OF QUEENS) SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Howard Beach, New York.

That on February 26, 1985 deponent served the within Notice of Appeal on

Affidavit of Service

Robert Abrams, Attorney General of the State of New York, Attorney for Appellees Cuomo, Regan and Retirement System at 2 World Trade Center, New York, New York 10047.

Michael Colodner, Esq., Attorney for Appellee Office of Court Administration at 270 Broadway—Room 1400 New York, New York 10007.

Emilio Nunez, Esq., Attorney for Appellee Jacob at 100 Church Street, New York, New York 10007.

Gaffin & Mayo, P.C., Attorneys for Appellee Gerschwer at 233 Broadway, New York, New York 10279.

Nicholas J. Miglino, Esq., Attorney for Appellee Ramos at 217 Broadway, New York, New York 10007.

The address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to me this 26th
day of February, 1985.

/s/ Yvonne Galliani

/s/ Cammy Cerrati

Cammy Cerrati
Notary Public, State of New York
No. 30-4304035
Qualified in Nassau County
Commission Expires March 30, 1986

New York Judiciary Law
Section 23

§ 23. Age limitation on term of judicial office

No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of December next after he shall be seventy years of age, except that a judge or justice in office or elected or appointed to office at the effective date of this section,[1] as to whom no provision limiting his right to hold office to the close of the year following his attaining the age of seventy years was applicable prior to the effective date of this section, may continue in office during the term for which he was elected or appointed.

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1. April 9, 1945.

New York State Constitution
Article VI, Section 25 Subd. (b)

§ 25. [Compensation and retirement of judges and justices; continuation of services after retirement]

b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supereme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six. A retired judge or justice shall be subject to assignment by the appellate division of the supreme court of the judicial department of his residence. Any retired justice of the supreme court who had been designated to and served as a justice of any appellate division immediately preceding his reaching the age of

seventy shall be eligible for designation by the governor as a temporary or additional justice of the appellate division. A retired judge or justice shall not be counted in determining the number of justices in a judicial district for purposes of section six subdivision d of this article.

No. 85-4 (D)

Supreme Court, U.S.
FILED
AUG 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN, and WILLIAM C. BRENNAN,

Appellants,

vs.

MARIO CUOMO, GOVERNOR OF THE STATE OF NEW YORK, EDWARD V. REGAN, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES AND ENRIQUE CALDERON,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION BY APPELLEES MARIO CUOMO, EDWARD V. REGAN AND NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM TO DISMISS OR AFFIRM

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BEST AVAILABLE COPY

13 pp

Questions Presented

1. Whether Article VI, Section 25(b) of the New York State Constitution and Section 23 of the New York State Judiciary Law, in providing for expiration of the term of office of most State judges on the last day of December in the year in which they reach the age of seventy, are reasonably related to a legitimate State purpose and thus within the due process and equal protection clauses of the Fourteenth Amendment?

2. Whether Article VI, Section 25(b) of the New York State Constitution, in providing that judges of the State Court of Appeals and justices of the State Supreme Court may be certified to perform the duties of a State Supreme Court justice until the age of seventy-six, is reasonably related to a legitimate State purpose and thus within the equal protection clause of the Fourteenth Amendment?

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No. 85-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN, and WILLIAM C. BRENNAN,

Appellants,

VS.

MARIO CUOMO, GOVERNOR OF THE STATE OF NEW YORK, EDWARD V. REGAN, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES AND ENRIQUE CALDERON,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION BY APPELLEES MARIO CUOMO, EDWARD V. REGAN AND NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM TO DISMISS OR AFFIRM

Opinions Below

The opinion of the New York State Court of Appeals is reported at 64 N.Y.2d 242, 48 N.Y.S.2d 724 (1984). The opinion of the

New York State Supreme Court, Appellate Division, First Department, is reported at 105 A.D.2d 193, 483 N.Y.S.2d 690 (1st Dep't 1984). The opinion of the New York State Supreme Court, Special Term, Part I, New York County, is reported in *The New York Law Journal*, Dec. 20, 1984, at p. 12, col. 6. These opinions are set forth at J. 1a, 14a and 28a, respectively.*

Statement Of The Case

Appellants are four judges of the Civil Court of the City of New York and one justice of the Supreme Court of the State of New York. They contend that Article VI, Section 25(b) of the New York Constitution and Section 23 of the New York Judiciary Law violate the equal protection and due process clauses of the Fourteenth Amendment.** In effect, these provisions establish a retirement age of seventy for virtually all State judges. However, Article VI of the State Constitution and Sections 114 and 115 of the Judiciary Law provide that judges of the State's highest court, the Court of Appeals, and justices of the court with the broadest jurisdiction in the State, the Supreme Court, may be certified for continued service on the bench until age seventy-six.

Article VI, Section 25(b) of the State Constitution, which took effect September 1, 1962, was an early step in the reorganization and unification of the State court system. It continued in effect a constitutionally mandated judicial retirement age that for at least certain State court judges has appeared in every State Constitution since the first New York Constitution of 1777. That Constitution provided, in Article XXVI, that the judges of the State Supreme Court and the first judge of every county court had to relinquish office at age sixty.

Over time, various constitutional amendments have been proposed which would have raised the mandatory retirement age

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* References in the form J.____ are to appellants' Jurisdictional Statement.

** The challenged provisions are set forth at J. 6-7.

to seventy-five, exempted Court of Appeals judges from mandatory retirement, or eliminated the provision entirely, but none of these proposals was ever approved by the Legislature and submitted to the public. *See, e.g.*, Record of the 1983 New York State Constitutional Convention, Vo. II, pp. 531-534. To the contrary, concern over the effects of advancing age on judicial performance has been continually voiced both in the Legislature and at successive constitutional conventions. *See, e.g.*, Record of the 1967 New York State Constitutional Convention, IV-845, 858, 887-889, 947-948. Thus, as the State Court of Appeals commented early on, the State Constitution reflects "the apprehension that, during [a] long [judicial] term, the natural decay of the powers of the man might at times leave upon the bench an inefficient judge." *People v. Gardner*, 45 N.Y. 812, 819 (1871). Addressing that apprehension, the State Constitution, "instead of prohibiting the election [to long judicial terms] of those who were too old to serve the full period, [limits] the term in such cases to the length of time they could serve," *i.e.*, to age seventy. *People v. Brundage*, 78 N.Y. 403, 406 (1879).

Article VI, Section 25(b) also permits mandatorily retired judges of the State Court of Appeals and justices of the State Supreme Court, but not judges of the Civil Court, to apply for certification to perform the duties of a Supreme Court justice for as many as three two-year terms, but in any event not beyond age seventy-six. Together with the new Sections 114 and 115 of the Judiciary Law,* Article VI, Section 25(b) thereby replaced the official referee, an anomalous position abolished in the reorganization of the courts, and at the same time sought to make better use of the talents of former Court of Appeals judges and Supreme Court justices. Plan of the Temporary Commission on the Courts, July 2, 1956, p. 57.

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* Sections 114 and 115 of the Judiciary Law, both added by L. 1962, c. 704, § 2, provide that State Court of Appeals judges (§ 114) and State Supreme Court justices (§ 115) retired pursuant to Article VI, Section 25(b) of the State Constitution may be certified for continued service upon findings that they have the requisite mental and physical capacity and that their services are necessary to expedite the business of the State Supreme Court.

Appellants brought this action seeking a declaration that Article VI, Section 25(b), and Judiciary Law, Section 23, violate the equal protection and due process clauses of the Fourteenth Amendment. The State Supreme Court, at Special Term, granted appellants' motion for preliminary injunctive relief, but on appeal, the Appellate Division, First Department, unanimously reversed and dismissed the complaint. In the order which appellants seek to appeal to this Court, the State Court of Appeals unanimously determined that Article VI, Section 25(b), and Judiciary Law, Section 23, are reasonably related to a legitimate State purpose and, accordingly, modified the Appellate Division's order to declare these provisions constitutional.

Argument

A. *Appellants' Jurisdictional Statement Is Untimely*

The Rules of this Court provide that an appellant must docket a case by *inter alia* filing a jurisdictional statement with proof of service within ninety days after entry of the judgment appealed from. U.S. Sup. Ct. Rules, Rule 12.1, 12.3. The remittitur of the New York State Court of Appeals was entered in the Office of the County Clerk, New York County, on January 8, 1985. Appendix to Appellees' Motion To Dismiss or Affirm, *infra*, at A-1. Accordingly, appellants were required to file their Jurisdictional Statement on or before April 8, 1985.

Appellants' Jurisdictional Statement was not filed, however, until July 3, 1985. It is therefore untimely by almost three months. Appellants never moved for an enlargement of time pursuant to Rule 12.2 of the Rules of this Court, and they fail to offer a reasonable excuse for their untimely docketing. Although appellants' counsel of record disclaims awareness of or responsibility for this delay, J. 3-5, he has been appellants' attorney throughout this action, and he is ultimately responsible for compliance with the Rules of this Court. "Counsel who enter their appearance...must understand that the court will hold them responsible for all that such an entry implies until they relieve themselves from the obligation they assume, by substitution or otherwise." *Alvord v. United States*, 99 U.S. 593 (1878). Therefore, the appeal should be dismissed as untimely docketed.

B. *This Case Raises No Substantial Federal Questions*

According to appellants this case raises two substantial federal questions which warrant review by this Court. The first concerns age discrimination claims of judges, J. 15, and the second concerns the level of scrutiny to be applied under the Fourteenth Amendment to age-based classifications, *id.*

We submit that neither is a substantial federal question meriting plenary review. The mere fact that redress is being sought by judges and not janitors does not render the questions in the case substantial. Moreover, on July 1, 1985, this Court reaffirmed the rule that differential treatment based on age is subject to neither "strict" nor "heightened" scrutiny in determining compliance with the equal protection clause of the Fourteenth Amendment. *Cleburne v. Cleburne Living Center*, ____U.S.____, 53 U.S.L.W. 5022, 5024 (1985); *see also, Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). Thus, contrary to appellants' suggestion, there is no need to "clarify for the nation the question of ... whether age is now a suspect class." J. 15.

Appellants argue that Article VI, Section 25(b) of the State Constitution and Section 23 of the Judiciary Law deny them equal protection in three ways:

(1) by unreasonably discriminating between judges over the age of seventy and judges under the age of seventy without regard to individual competence;

(2) by unreasonably discriminating between judges and all other elected and appointed public officials in the State and its political subdivisions who are not subject to a mandatory retirement age;

(3) by unreasonably discriminating between judges of the Civil Court and justices of the State Supreme Court, since the latter, but not the former, may apply for certification to perform the functions of a State Supreme Court justice for successive two-year terms until age seventy-six.

It is clear from appellants' recitation of the decision by the New York Court of Appeals, J. 10-15, that all of these claims were addressed and properly rejected by that court, just as virtually identical claims have been uniformly rejected by other appellate courts. *See, e.g., Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980); *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), cert denied, 444 U.S. 906 (1979); *Rubino v. Ghezzi*, 512 F.2d 431 (2d Cir.), *cert. denied*, 423 U.S. 891 (1975).

The State Court of Appeals confirmed that the challenged age limitation is rationally related to the promotion of a number of legitimate State interests, J. 9a. The Court also confirmed the existence of a rational basis for restricting post-retirement service in the State Supreme Court — a court of "broad, general jurisdiction" and "State-wide reach" — to former judges of the State's highest two courts, J. 10a. Indeed, the wisdom of New York's decision to address only the problems of State Supreme Court, and the "mathematical nicety" of that decision, are not appropriate matters for the courts to consider. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).*

The same reasons that defeat appellants' equal protection claims also defeat their claim under the due process clause that the challenged provisions create an "irrebuttable presumption" that persons over seventy cannot perform their judicial duties. The irrebuttable presumption doctrine has no application to cases of this kind. This Court did not apply it in *McIlvaine v. Pennsylvania*, 415 U.S. 986 (1974), *dismissing appeal from* 454 Pa. 129, 309 A.2d 801 (1973) (upholding constitutionality of state statute mandating retirement at age sixty for Pennsylvania State Police) or *Weisbrod v. Lynn*, 420 U.S. 940 (1975), *aff'g* 383 F. Supp. 933 (D.D.C. 1974) (3-judge court) (upholding constitutionality of Federal Employee Mandatory Retirement Law [mandating retirement at age seventy]). Such summary affirmances and dismissals

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* Appellants lack standing to raise any claims on behalf of individuals who voted for them. No voter is a party to this action. Such claims, moreover, are plainly insubstantial, for under New York's constitutional and statutory scheme, appellants' terms were openly delimited from the outset by the mandatory retirement provisions they now contest.

for want of a substantial federal question are rulings on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

In short, the doctrine of irrebuttable presumptions is merely "coextensive with the equal protection clause." *Trafelet v. Thompson*, 594 F. 2d at 630. If "a classification is sustainable as rationally based, then it should not fall because it might also be labeled a presumption." *Palmer v. Ticcione*, 576 F. 2d 459, 463 (2d Cir. 1978). This appeal, therefore, presents no substantial federal questions for this Court's determination and should be dismissed.

CONCLUSION

The appeal should be dismissed or in the alternative the order of the New York State Court of Appeals should be affirmed.

Dated: New York, New York
July 31, 1985

Respectfully submitted,
ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Appellees Cuomo, Regan and Retirement System

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Assistant Attorney General
Of Counsel

Remittitur

Court of Appeals
State of New York

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 698

OREST V. MARESCA, et al.,

Appellants,

v.

MARIO CUOMO, Governor &c., et al.,

Respondents.

The appellant(s) in the above entitled appeal appeared by Giamo & Vreeburg; *the respondent(s) appeared by* Hon. Robert Abrams, Attorney General, State of New York; Fried, Frank, Harris, Shriver & Jacobson, Esqs.; Michael Colodner, Esq.; Nicholas J. Miglino, Esq.; Gaffin & Mayo, P.C.

The Court, after due deliberation, orders and adjudges that the order is modified, with costs to respondents, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Jasen. Judges Jones, Wachtler, Meyer, Simons and Kaye concur. Chief Judge Cooke took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County,

there to be proceeded upon according to law.

I certify that the proceeding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ _____
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 31, 1984.

FILED JANUARY 8, 1985
COUNTY CLERK'S OFFICE, NEW YORK